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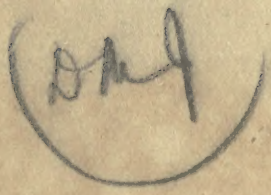

Morgan James

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# A CENTURY OF LAW REFORM

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# A CENTURY OF LAW REFORM

## TWELVE LECTURES ON THE CHANGES IN THE LAW OF ENGLAND DURING THE NINETEENTH CENTURY

DELIVERED AT THE REQUEST OF
THE COUNCIL OF LEGAL EDUCATION
IN THE OLD HALL, LINCOLN'S INN,
DURING MICHAELMAS TERM 1900
AND HILARY TERM 1901

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London
MACMILLAN AND CO., LIMITED
NEW YORK: THE MACMILLAN COMPANY
1901

GLASGOW: PRINTED AT THE UNIVERSITY PRESS BY
ROBERT MACLEHOSE AND CO.

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# A CENTURY OF LAW REFORM

# I.

## *INTRODUCTORY.*

## CHANGES IN THE COMMON LAW AND IN THE LAW OF PERSONS, IN THE LEGAL PROFESSION AND IN LEGAL EDUCATION.

(Thursday, November 8th, 1900.)

THE nineteenth century will end in less than two months. And the Council of Legal Education has determined that it must not be allowed to expire without some attempt being made to record and illustrate the changes that have taken place in the law of England during the century. Men of other professions have been proclaiming the advance of science, the wonders of invention, the extension of trade, the increase of the population, and of the country's material wealth, during that period. And it is surely right that here in the Inns of Court, in the School of Law for London, the attention of our students should be expressly directed to the great improvements which have been made, both in our law and in its administration, since the year 1800.

And to me has been assigned the honour of delivering the first lecture, which is to serve, in some measure, as an introduction to the course.

Turn back then with me, if you please, to the year 1800. On the throne was King George III., an honest, hard-working, well-meaning, but pig-headed monarch, who had already given signs of that malady which darkened his later years. The younger Pitt was the prime minister—a true statesman—a man who knew his own mind, formed his own policy, and adhered to it. Though the King scolded him, though the mob howled at him, he went on his own way, resolute, collected, and cool. He was a strong man,—a man of tireless industry, of great skill in debate, with wide knowledge of men and of affairs. And he was a statesman, too, in this: that he looked ahead. When he saw trouble impending anywhere, he did what he could to remedy it at once, before it grew to a crying evil and a source of danger. He did not wait till the newspapers had got hold of it and exaggerated and misrepresented it and made an outcry in the land. If the King had let Pitt have his way, we should have been spared half our troubles with Ireland. But the King would not, and so in February, 1801, Pitt resigned. England was still to some extent a monarchy.

It was also to a large extent an aristocracy. It was largely governed by peers. The House of Lords was still a power in the land. And moreover peers appointed a large portion of the House of Commons; they owned boroughs, and could return whom they would to represent these boroughs in Parliament; 89 peers thus returned 175 members

to the lower House; 100 other members were similarly nominated by large landowners who were still commoners. Most of the remaining members were elected by close corporations, to the exclusion of the great body of the inhabitants of the town. In the counties only freeholders had votes. Gatton and Old Sarum returned members to Parliament, though Gatton had but five voters, and Sarum none at all; while populous towns, like Manchester and Leeds and most of the manufacturing centres, had no representatives at all. Bribery and corruption were rampant, both among the constituencies and among the members of Parliament. England certainly was not a democracy in the reign of George III. It was a monarchy blended with an aristocracy. It no doubt presented to the continent of Europe the appearance of a happy, united, and prosperous country. But this appearance was compatible with much misery at home. Enormous sums were raised by taxation, and yet the national debt grew during the war from 268 millions to the portentous sum of 800 millions. And this taxation was imposed chiefly on the necessaries of life, on malt, on tea and sugar, on medicines and paper, and even on windows. Newspapers were taxed fourpence a copy; salt was taxed to the extent of forty times its cost. And at the same time protective legislation, as it was called, excluded all food supply from abroad. The importation of beef was absolutely forbidden; no cattle, alive or dead, could be landed on our shores. No foreign grain could be imported until wheat in the home markets had been for at least six months at or over the price of 80s. a quarter. The social condition of our

English people had fallen very low indeed, and during the war with France no steps whatever were taken for their elevation. Our glorious victories were bought with a great price.

Two more facts I must impress upon you with regard to the opening of this century. There were no sewers in 1800—no sewers, no inspectors of nuisances, no medical officers of health, no vaccination, no Local Boards of Health, no parish councils, district councils, county councils, no unions, no district surveyors, no School Boards, no Burial Boards, no sanitary legislation, very few hospitals, and very little local government. Again, there were no policemen in 1800; a few venerable Charleys made a faint effort to keep some order in the London streets at night. Besides these there was only the parish constable. To us it seems almost impossible that society could exist without sewers and without policemen! But our grandfathers seemed quite happy without either.

All this now is changed. Power no longer resides in the monarch or in the House of Lords. The δημὸς now hath κρατὸς. Bribery and corruption are said to be extinct. The franchise has been extended almost to the verge of manhood suffrage. Parliament passes 150 Acts a year, which an ungrateful country leaves religiously unread. A policeman stands at every corner, except when we want him. One government official kindly analyses our food and drink for us, and tells us how unwholesome it is. Another makes us nervous by explaining that milk is a marvellous fertile matrix for diphtheritic germs. A third kindly mentions that the death-rate was higher than usual last week in our parish: while

a fourth obligingly publishes what the weather will or will not be tomorrow. And every month we have an election; either for Parliament, or for a Borough or County Council, or for the School Board, or some other of the numerous Boards and local authorities, each of which seems to have a different name and a different area and a system of voting peculiar to itself. My friend and colleague, Mr. Carter, in his lecture this day three weeks, will prove to you that all this is the natural and necessary consequence of the Reform Act of 1832. Another friend and colleague, Mr. Bate, will describe to you the changes which have taken place during the century in that branch of learning which is popularly styled "International Law."

Leaving now all constitutional and international questions, let us turn to private law. We find since 1800 a marked improvement both in the substance of our criminal law and in the whole tone of its administration. In the year 1800 there were more than 200 crimes punishable with death! Of these more than two-thirds had been made capital during the eighteenth century. Sir Samuel Romilly asserted that there was no other country in the world "where so many and so large a variety of actions were punishable by loss of life." Nearly all felonies were capital. If a man falsely pretended to be a Greenwich pensioner, he was hanged. If he injured a county bridge, or cut down a young tree, he was hanged. If he forged a bank note, he was hanged. If he stole property valued at five shillings; if he stole anything above the value of one shilling from the person; if he stole anything at all, whatever its value, from a bleaching-ground; he was hanged.

If a convict returned prematurely from transportation; or if a soldier or sailor wandered about the country begging without a pass; he was hanged. And these barbarous laws were relentlessly carried into execution. A boy only ten years old was sentenced to death in 1816; whether he was actually executed I cannot say.

Thanks to Sir Samuel Romilly, and later to Sir James Mackintosh, the number of capital offences was gradually reduced; and now we have but four crimes punishable with death, two of which very rarely occur. In 1800, too, our prisons were sinks of iniquity and disease; the gaolers feared to enter a cell lest they should catch gaol-fever; and a sentence of imprisonment was often a sentence to death. Now great care is taken of the health and morals of our convicts in prison. And a criminal trial now is conducted in a very different fashion from a trial in 1800. The prisoner now is treated with the utmost fairness and consideration. We have fewer prisons and fewer prisoners. My friend Sir Harry Poland, whose experience in the criminal law is unique, will explain to you the details of this change in his lecture this day week.

In Common Law, and in the procedure of the Courts which enforce it, many great changes have taken place during the century. Of course a contract is much the same now as it was in 1800. But in 1800 no contracts, except negotiable instruments, were assignable. Only the original parties to a contract could sue on it. Now the benefit of nearly every contract is assignable, provided it be assigned in writing and notice of the assignment be given in writing to the party bound by it. On the other

hand, wagering contracts in 1800 could be enforced in the courts of law; and all sorts of extraordinary actions were the result. If a bet was made, not upon any illegal sport, or any game or race, the result was a legal debt, for which an action would lie; and such actions were solemnly tried in open court. This was put an end to by an Act passed in 1845. The list of negotiable instruments has been somewhat extended. The laws against usury were repealed in 1854; though the last year of this century has seen enacted a law which compels every money-lender to register himself as such, and enables the Court in some cases to set aside or reform a harsh or unconscionable bargain with a money-lender.[1] The liability of carriers of goods was considerably lessened by the Carriers Act, 1830, and the Railway and Canal Traffic Act, 1854. On the sale of a chattel there were formerly vexed questions as to the extent of the responsibility of a vendor who had given no express warranty. Did he impliedly warrant that the goods were his? Did he impliedly warrant that the goods were of a certain, or of any, quality? Did he impliedly warrant that the goods were reasonably fit for the purpose for which he was told they were wanted? All these questions have been set at rest by an admirably drafted codelet, the Sale of Goods Act, 1893. The purchaser of a chattel is now protected against imposition by the Merchandise Marks Act, 1887; and against adulteration by the Sale of Food and Drugs Acts, 1875 and 1879, and the Margarine Act, 1887.

An important change was made in the law of

[1] 63 and 64 Vict., c. 51.

partnership. It had been laid down in 1794 that whoever shared in the general profits of a business must of necessity be liable for the debts of the business.[1] This general principle was overruled by a decision of the House of Lords in 1860, closely followed by a statute passed in 1865.[1] And now it is no longer law that everyone who shares in the profits made by a firm is necessarily a partner and as such liable for the debts.

With a few exceptions, the principles of law applicable to torts remain much as they were in 1800. The most marked change was made by Lord Campbell's Fatal Accidents Act, 1846. As the law stood in 1800, if a passenger was upset in a stage-coach and his leg broken, he could sue the proprietor and recover damages for the pain which he had suffered, the injury done him, and the medical and other expenses which had been incurred. But if he was killed outright by the accident, his family and his executors had no redress whatever. They could not even recover his funeral expenses! His right of action was said to be personal and to have died with him. So it was a bad thing pecuniarily for the proprietor of a stage-coach, if his passengers recovered from their injuries; it was to his advantage, if there was to be an accident at all, that they should all break their necks. This was put a stop to by Lord Campbell's Act in 1846.

Emphasis has been repeatedly laid during the century on the important distinction between an illegal and an irregular distress. In the law of libel, the most interesting feature is the large increase in

[1] *Waugh* v. *Carver* (1794), 2 H.Bl. 235; *Cox* v. *Hickman* (1860), 8 H.L.C. 268; 30 L.J.C.P. 125; 28 and 29 Vict., c. 86.

the number of occasions which the law deems privileged, and the full recognition of the liberty of the press. As Sir Alexander Cockburn, L.C.J., said in 1868 :

> "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers of State, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change?"[1]

The principles of equity have not materially changed since 1800. What was a breach of trust then is a breach of trust now, though great and much-needed relief has been afforded to trustees by enabling them to plead the Statute of Limitations in many cases where their default was not fraudulent. The rules laid down by Lord Eldon in *Ellison* v. *Ellison* are still applied in cases of Voluntary Trusts. The law as to constructive notice declared by Lord Hardwicke in *Le Neve* v. *Le Neve* and other cases endured till 1882, when it was modified by the Conveyancing Act. The old doctrines of the Courts of Equity as to conversion and election,

[1] *Wason* v. *Walter*, L.R. 4 Q.B., pp. 93, 94.

ademption of legacies, priority of mortgages, and marshalling assets, remain substantially in force to this day; though the rules relating to the administration of the estates of deceased persons have been altered by many statutes. Other changes my friend Mr. Birrell will no doubt explain to you on December 13th. An enormous improvement (so far as a Common Law man can judge) has been made in Equity procedure by the Judicature Act. I will mention only one instance which affects the all-important matter of costs. Under the present practice any single question as to the construction of a will can be determined on an originating summons, by itself, and a declaration or direction obtained. Formerly no such decision could be obtained without the unhappy beneficiaries being put to the ruinous expense of having the whole estate administered by the Court, with all the formal apparatus of accounts and enquiries dating back to the death of the testator. Often the threat "to fling the whole estate into Chancery" uttered by one cantankerous member of a family has brought about an unfair compromise, much to his advantage.

In the law of real property, on the other hand, changes of enormous importance have been made during the century. Lord Thurlow would have been shocked and horrified to learn that a tenant for life can now sell the fee-simple of the family estates, and give a good title to the purchaser; he would have been still more amazed and grieved if he had been told that before the end of the century a man's freehold would vest on his death in his executor and not in his devisee. Though perhaps it would have been some comfort to him to know that when a man dies

intestate, it is still the law that his eldest son excludes all his brothers and sisters from any share in the father's real estate.

In conveyancing, too, the changes have been equally startling. In 1800 no man could convey to another freehold land in possession by a simple deed. Such land did not lie in grant. Either the purchaser and the vendor had to visit the spot and go through the elaborate ceremony of a feoffment with livery of seisin; or, what was more usual, the parties had recourse to the device of creating an unnecessary tenancy by means of a Lease and then supplementing it by a subsequent Release—two deeds and double the cost. An end was put to this in 1845. Fines and recoveries were abolished in 1833. Since then title-deeds themselves have been so shortened and simplified by the Conveyancing Acts that they no longer deserve Lord Westbury's severe censure. You remember that he spoke of title-deeds as being "difficult to read, impossible to understand, and disgusting to touch." The details of these changes my friend and colleague, Mr. Underhill, will expound to you next term.

In 1800 there was no such thing as an ordinary limited liability company. There were a few trading companies each incorporated by its own private Act of Parliament. But apart from these, every trading concern in which more than one man was interested was just a common law partnership, and each partner was personally liable for the whole of the debts of the firm. Now any one can take as many shares as he likes in a limited liability company, and as soon as he has paid for his shares in full he is free from all further liability to the creditors of the company.

Whether the change was a good one or a bad one, it is hard to say. It has no doubt greatly encouraged and facilitated commercial enterprise; it has carried British capital into every corner of the inhabited globe. But at the same time it has caused dire distress at home. This is the subject on which my friend, Mr. Napier, is to lecture to you next term. He will describe the rise of the joint-stock company and of the limited liability company, and discuss the advantages and disadvantages of this development of our law. The procedure under the Companies' Acts has constantly been used to enable designing persons to swindle those who on their invitation have become shareholders in their company; and often alas! this has been done with absolute impunity. Acts have been passed from time to time to remedy this, but the swindlers hitherto have always been more than a match for the legislators, and have created new frauds which were not within the new statute. Only this year we have a new Act, the Companies Act, 1900, which no doubt will be beneficial in many respects. But it does not apparently do anything to prevent the abuse known as the "one man company." When the present mode of incorporating companies was first started, the Act required that the Memorandum of Association should be signed by seven shareholders. And by that the legislature meant of course seven persons who had a substantial interest in the concern; but it did not say so expressly. Hence a man can now turn his business into a company whenever he likes by giving one share apiece to two sons, three clerks, and a nephew.[1]

There was no Bankruptcy Court in 1800. Bank-

[1] *Salomon* v. *Salomon & Co.* (1897), A.C. 22.

ruptcy was originally regarded as a crime; in the earliest Bankruptcy Acts the bankrupt is always alluded to as "the offender." But before 1800 bankruptcy had come to be regarded as the proper remedy for traders in embarrassed circumstances. But this relief was limited to "traders"; no one else could avail himself of the Bankruptcy Laws. A private gentleman, an attorney, a solicitor, a stock-broker, a farmer, or a grazier, was not a trader, nor was any labourer or workman. If any of these persons could not pay his just debts, he had to rot in the Marshalsea or the Fleet till his friends or relatives took pity on him and found the money. This was then the deliberate policy of our law, that if a man was hopelessly in debt he must be locked up and deprived of all chance of earning any money with which to pay his creditors! The creditor seized his body in satisfaction of the debt. This is the state of things which Dickens so powerfully describes in *Pickwick* and in *Little Dorrit*. Nor does he exaggerate in the least. You can learn a great deal of law from Dickens' novels. And remember that he was a student of the Middle Temple, though he was never called to the Bar.

The first step for the relief of these insolvent debtors was taken in 1808; when an Act was passed exempting from imprisonment in certain cases judgment debtors who had been taken in execution for any debt or damages not exceeding £20, exclusive of costs. Other statutes followed in 1844, 1845, and 1846. The Bankruptcy Act of 1861 contained provisions for the discharge from prison of paupers and lunatics who were imprisoned for debt. At last in 1869 imprisonment for debt was abolished alto-

gether, except in the case of a dishonest person who can pay but won't. And now all debtors are liable to be made bankrupt, whether traders or not. Even a married woman who carries on a trade separately from her husband can now be made a bankrupt. The Bankruptcy Act of 1883 introduced immense improvements in the administration of insolvent estates. I remember very well the time when bankruptcy was defined—and with substantial accuracy—as "that state of things which exists when, a man being unable to pay his debts, his solicitor and an accountant divide all his property between them." Such a definition has no truth in it now.

And there was no Divorce Court in 1800. At the commencement of the century, the marriage bond could be severed by nothing less than an Act of Parliament. That is still, I believe, the law in Ireland, which is still without a Divorce Court. And before asking for an Act of Parliament, the injured husband was required, first, to sue the adulterer at law and obtain a verdict against him for damages, and then to take proceedings in an Ecclesiastical Court for a decree of divorce, *a mensâ et thoro*. When he had succeeded in these two Courts, he might commence his application to Parliament. In other words, only a very wealthy man could obtain a divorce in England in 1800. In 1858 a Court for Divorce and Matrimonial Causes was established which has since been merged in the Probate Divorce and Admiralty Division of the High Court of Justice.

There is however in England a distinction between the spouses. A husband can obtain a divorce from his wife on proof of her adultery. But it is not enough for a wife to show that her husband has

committed adultery. She must go further and prove that he has also been guilty of cruelty or desertion, etc. In Scotland there is no such distinction between the rights of the husband and the wife. Either of them can obtain a divorce on proof of either adultery or persistent desertion. Whatever entitles a husband to a divorce will also entitle the wife. Is it not strange, is it not amazing, that at the end of the nineteenth century there should still be, in England, Scotland, and Ireland, three entirely different and conflicting bodies of law with regard to marriage and marital rights? Is it not time that we had one code of marriage laws for the three countries which are really one?

But the most marked development in our law during the nineteenth century is seen in the legislation on behalf of those classes of persons who were under some disability or disadvantage in the battle of life. During the reign of our beloved sovereign, and partly no doubt owing to her gracious influence, Parliament has shown marked concern for all who were unable adequately to protect themselves. It has interfered on behalf of the weak against the strong, of the workman against his employer, of the woman and child against all who might oppress them. I can only touch briefly to-night on a few of the more striking instances; but these will be enough to show you how wise, how considerate and, I may say, how gentle, is the tone in which our law now deals with such classes of persons.

### 1. *Infants.*

First, as to infants. Many Acts have been passed in this century for the protection of infants from those

who would entrap them into disadvantageous contracts. In 1800, a contract made by an infant was not void; it was only voidable. It was therefore capable of ratification; and on very slight evidence indeed a jury would infer that the young man, directly he came of age, had ratified the contract which he had made when an infant. Juries were especially ready to find that ratification had been proved in cases of breach of promise of marriage, even where the plaintiff might "very well pass for forty-three in the dusk with the light behind her," and the defendant was less than half her apparent age. In 1829, however, Lord Tenterden brought in a Bill which enacted that every ratification of any contract made by an infant while still under age, must be in writing; mere words or conduct could no longer be a ratification; there must be a writing signed by the defendant. Then, in 1874, the Infant Relief Act was passed, which made every promise by an infant *ipso facto* void, and incapable of being ratified; so now, if two silly young people get engaged when they are under twenty-one, neither of them is bound; the defendant must make a new contract after he is of age. Though I am bound to say that juries have a bad habit of finding a new contract on very meagre evidence.

Many Acts have also been passed during the century in order to secure for our children sound minds in healthy bodies, and to protect them from unnecessary harm. I commend to your especial notice the Factories Act, 1802-1895, the Chimney Sweepers' Acts, and the various Mines Acts. The first of the series was passed in 1802. It was entitled "An Act for the Preservation of the Health and Morals of Apprentices and others employed in Cotton and other

Mills, and Cotton and other Factories."[1] Up to that time, I am afraid that the apprentices and others employed in cotton and other mills had, as a rule, no health, and no morals, and they certainly had no education ; but this Act prescribed rules for admitting fresh air into the factories, regulated the hours of employment, and insisted that children under ten should have some kind of education. The last of this set of Acts is that passed in 1900, by my friend, Mr. Robson, Q.C., which forbids that any boy under the age of thirteen years should be employed in any mine below ground.[2] Under the Shop Hours Acts, 1892, 1893, and 1895, no young person under the age of eighteen can be employed in or about a shop for a longer period than 74 hours, including meal times, in any one week.

Two valuable Acts, called the Infant Life Protection Acts, were passed in 1872 and 1897 for the protection of infants against the wretches known as "baby-farmers." Most valuable regulations have been made by the Local Government Board under the Canal Boats Acts, 1877 and 1884, for the inspection of canal boats, with the object of securing that adequate accommodation is provided for all persons, young and old, who sleep on board, that due regard is paid to sanitation, and that the children living on board such boats shall receive some education. We owe these beneficial Acts to the benevolence and energy of the late Mr. George Smith of Coalville. Our law even invades the sanctity of home-life, where such home-life is a disgrace to that name. A most valuable measure was passed in 1894, chiefly through the instrumentality of the Society for the Prevention of

[1] 42 Geo. III. c. 73. [2] 63 and 64 Vict. c. 21

Cruelty to Children, called The Prevention of Cruelty to Children Act. It consolidated and extended two former Acts passed in 1889 and 1894.[1] It enacts that any person above sixteen years of age, whether a parent, step-parent or not, who has the custody, charge, or care of any child under the age of sixteen years, and who wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures it to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause unnecessary suffering, or injury to its health, or injury to or loss of sight, or hearing, or any limb or organ of the body, or any mental derangement, shall be guilty of a misdemeanour. It also imposes a fine not exceeding £25 on any person who having the custody or being in charge of any child under the age of eleven years causes or allows it, to be in any street, or in any premises licensed for the sale of any intoxicating liquor, or for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale; or who having the custody or being in charge of any child under the age of sixteen years, causes or allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous. While by virtue of two Acts passed in 1879 and 1897 respectively, called the Children's Dangerous Performances Acts, no boy under sixteen and no girl under eighteen may be employed in any dangerous public exhibition or perfor-

[1] 52 and 53 Vict. c. 44; 57 and 58 Vict. c. 27; 57 and 58 Vict. c. 41.

mance, under a penalty not exceeding £10; and this fine is recoverable on summary conviction from the person who causes the child to take part in the performance, and also from the parent or guardian, or any custodian of the child who aids or abets him. Moreover, if the child is injured in such performance, the employer is indictable for assault, and the Court at the trial may award compensation not exceeding £20 for the bodily harm which the child has sustained.[1]

## 2. *Lunatics.*

The jurisdiction of the Lord Chancellor over lunatics was practically the same in 1800 as it is now. But the administration of the Lunacy Laws has greatly improved, and lunatics are now protected from ill-usage in a manner quite unknown at the beginning of the century. A private lunatic asylum in 1800 was under no supervision or control whatever. Visitors in Lunacy were first appointed in 1845. And now no man can have more than one lunatic resident in his house without first obtaining a licence from the Commissioners in Lunacy which necessarily entails a periodical visit from a Commissioner in Lunacy or an officer of the Court. Many a sad story will be found in the Reports of the Commissioners in 1827 and subsequent years, which cannot, we hope, be repeated under the present system. Adequate provision has also been made for pauper lunatics by three Acts of Parliament passed in 1853, 1867, and 1890 respectively. Pauper lunatic asylums have been established in every county and are maintained and visited by the County Council.

[1] 42 and 3 Vict. c. 34; 60 and 61 Vict. c. 52.

In the Metropolis a central Asylums Board has been constituted, to the expenses of which every parish in the county of London contributes.

### 3. *Married Women.*

Next to lunatics, our polite text-book writers always place married women! And great indeed are the changes that have been made in this branch of our law. In 1800 a married woman had scarcely any rights; she could make no contracts, acquire no personal property, and all her earnings belonged to her husband. Such at least was the rule at law. In equity it was possible for a woman to have a marriage settlement executed before marriage, and thus preserve her property to her sole and separate use. The first few years of the new century witnessed two decisions which established for the first time the right of a married woman who had married without a settlement to have some portion of her own personal property settled upon herself and her children.[1] Now a wife is in a position of almost complete equality with her husband. An entire change has been introduced by the Married Women's Property Acts of 1870, 1874, 1882, and 1893. A married woman now can make a contract with reference to her separate property just as though she were unmarried; she can sell it or dispose of it by will; her earnings are her own. A wife deserted by or judicially separated from her husband can obtain a protection order to safeguard her earnings. And, by another beneficial Act passed in 1878, a magistrate can, on

[1] *Lady Elibank* v. *Montolieu* (1801), 5 Ves. 737; *Murray* v. *Lord Elibank* (1804), 10 Ves. 84.

proof that a woman has been violently assaulted by her husband, grant her a judicial separation. These matters will be explained in detail next term by my friend, Mr. Montague Lush, who is an authority on this subject.

Next, as to the custody of infant children. In 1800 a woman had no right, as against her husband, to have her children under her separate control. The father was alone the guardian of the children; he alone decided to what school they should go, to what trade they should be apprenticed, and above all, what religion they should be taught. And this no doubt is right enough so long as the father is alive. A husband should of course consult his wife on such questions, and if they can agree so much the better. But if they cannot agree, then one must decide, and that one—in the great bulk of cases at all events—should be the father. "An two men ride of a horse," as Dogberry says, "one must ride behind." But after the husband is dead, different considerations apply. The surviving parent, whether father or mother, should clearly be guardian of the children in preference to every other person. But this was not so in the year 1800. The father then had it in his power by his will to take the custody of the children away from the widow and give it to his brother or some other of his own relatives, by appointing him the testamentary guardian of the child. Gradually this injustice has been removed. By an Act passed in 1839, the mother was given a right to the custody of her own children till they were seven years of age. The Divorce Act of 1857 and the Matrimonial Causes Act of 1878 gave her a right to the custody of her children till they were sixteen years of age.

While in 1886 Mr. Bryce succeeded in carrying an Act through Parliament which for the first time made the mother the lawful guardian of her children after her husband's death. And this is right. When the father is dead, the mother surely is the proper person to control the education of her children, and to see to their start in life. Ever since the days of the "Babes in the Wood," uncles have been proverbially unfeeling!

### 4. *Dissenters.*

In 1800 the Nonconformists suffered from many grievances. But these have practically all been removed. In 1813 the benefits of the Toleration Act were for the first time extended to Unitarian Christians; and it ceased to be a crime for them to preach their special doctrines. The Test and Corporations Acts were repealed in 1828; and Protestant dissenters were thus enabled to sit in Parliament, and practically all civil and military employments were thrown open to them. The next year was passed the Catholic Emancipation Act, which relieved the members of the ancient church of this country from disabilities and penalties to which they had been subjected since the days of Queen Mary. In 1836 dissenters were for the first time allowed to solemnize marriages in their own chapels. In 1844 and 1846 Acts were passed legalizing trusts and endowments in favour of Jews and Roman Catholics and repealing all former Acts which exposed them to penalties and disabilities. Jews were admitted to Parliament in 1858. Compulsory Church rates were abolished in 1868. In 1871 religious tests were abolished at the Universities

of Oxford and Cambridge, except in connection with the theological degrees. Many grievances connected with the Burial Laws were removed in 1880 by Mr. Osborne Morgan's Act;[1] though nothing seems to provoke unpleasantness so readily as a funeral, when the relatives of the deceased are a little unreasonable and the parson a little narrow-minded. After much unseemly wrangling Mr. Bradlaugh was allowed to make an affirmation, and take his seat in Parliament in 1886. When the Elementary Education Act of 1870 was under discussion in the House, much alarm was felt and much controversy excited on the question of religious teaching in rate-supported schools. That controversy was lulled to sleep by a judicious compromise and the Cowper-Temple conscience clause; it rewakes occasionally, and then invariably does mischief. But it is now once more, happily, dormant. The compromise of 1870 still works satisfactorily on the whole. We are thus saved from a purely secular education in our Board Schools.

### 5. *Tenants.*

The Legislature has done much during the century to promote the interests both of landlords and tenants. In 1800 most leases contained a proviso entitling the landlord to re-enter if the rent which fell due on any quarter day was duly demanded and not paid within 21 days. Unless there were express words in the lease relieving the landlord from the task he had to prove that the rent had been duly demanded; otherwise he could not re-enter. And our judges in the eighteenth century seem to have had a rooted objec-

[1] The Burial Laws Amendment Act, 1880 (43 and 44 Vict. c. 41).

tion to a landlord's thus forfeiting his tenant's interest in the premises: for they insisted on the most rigid and precise proof of this demand of rent. The exact amount due had to be demanded at the right place and at the right moment of the right day. It was freely said in Westminster Hall, that no plaintiff ever succeeded in proving "a common-law demand" more than twice in a century. By the Common Law Procedure Act, however, such proof is dispensed with, whenever the rent is six months in arrear, and there are no goods on the premises, which, if distrained and sold, would realize enough to pay the rent in arrear. Thus one great difficulty was removed from the path of a landlord who seeks to recover possession of his property from a tenant who will not or cannot pay the rent which he agreed to pay.

On the other hand much has been done for the tenant. As the law stood in 1800, a farmer who yielded up or was ejected from his farm was compelled to make a present to his landlord of all the unexhausted improvements which he had made during his tenancy. The Agricultural Holdings Act of 1883 laid down the principle that on the termination of a tenancy the landlord must pay the tenant the fair value of the unexhausted portion of all improvements reasonably made by the tenant during the term. It provided also that no landlord could contract himself out of this Act, and that any clause in a lease purporting to do this is illegal. The Ground Game Act of 1881 gave the farmer the right to kill hares and rabbits on his farm—a right of which again he cannot be deprived by any clause in his lease. The Legislature has also deigned to protect the humble lodger. In 1800 a landlord whose rent was in

arrear could distrain any goods which he found on the premises whether they belonged to his tenant or to any one else. Thus a lodger's goods were often seized and sold because his immediate landlord had not paid his rent. The fact that the lodger had duly paid *his* rent made no difference. This injustice was remedied by the Lodgers' Goods Protection Act, 1871; and now a lodger in such circumstances is entitled to have his goods restored to him, on payment only of the amount, if any, which he owes for his lodging.

### 6. *The Working Classes.*

Much has been done during the century to promote the physical and social well-being of the working classes, and to improve their legal position with regard to their employers. In 1800 the conditions under which our industrial population had to work were cruel and degrading, detrimental alike to health, morality, and self-respect. Children only four or five years old were condemned to work all day long in sunless mines. Women worked side by side with the men, and worked as hard and as long as the men, and often amid revolting scenes and surroundings. But a systematic agitation was commenced by Richard Oastler, and carried on by Mr. Fielden and Lord Ashley, afterwards Lord Shaftesbury; the Report of the Royal Commission, which laid bare the scandals of the mines, was published in 1842, and at once arrested public attention; and as a result two measures were passed, one in 1842, forbidding women and children under ten to work underground at all, the other in 1844, limiting the hours of their labour in

factories. And now men, women, and children benefit alike by those Factory and Workshops Acts, on which my friend Mr. Ruegg will lecture to you next term.

All this interference with the liberty of the individual has been made with the intention of benefiting the working classes. Their health can no longer be ruined by long hours of labour in unhealthy rooms. The machinery which they use must be fenced lest an accident should occur. And the restrictions thus imposed on labour in factories and workshops have been extended to mines and gradually into almost every trade.

Should an accident occur in the course of his employment, the injured workman can recover compensation, or, if he be killed, his wife and children can promptly obtain redress, under the Employers' Liability Act of 1880 and the Workmen's Compensation Act of 1897, the latter of which has this year been extended to include agricultural labourers within its beneficial provisions. Though it still remains the law that if a workman is injured through the negligence of a foreman or fellow-workman, he cannot recover damages from the master. These questions will also be dealt with next term by Mr. Ruegg, who is an authority on the subject.

The numerous Artizan and Labourers' Dwellings Acts passed since 1868 tended little by little to give the working classes better dwellings and generally to improve the conditions of their life. And now by the Housing of the Working Classes Acts, 1885 to 1900, it has been made the duty of the local authority to close and demolish buildings unfit for human habitation: the local authority may also undertake

the provision of proper dwellings for labourers and others within their district. In rural districts the local authorities also provide allotments for labourers to cultivate, though they are still without those "three acres and a cow" which some persons promised so freely to our agricultural labourers in the summer of 1885.

Special regard has also been paid to the interests of our sailors; for the law deems our sailors quite as "absent-minded" as our soldiers. The various Merchant Shipping Acts have compelled shipowners to take reasonable precautions for the safety of their crews. Unseaworthy ships can no longer be sent to sea heavily insured by owners in the hope and expectation that they will go to the bottom. Seaworthy ships must not be overloaded. "Crimps" may no longer entice sailors to mortgage their wages in advance.[1]

In 1800 it was too often the custom for masters to pay the men their wages, not in cash, but in goods, or in tickets which could only be used for purchasing goods at the master's store. This practice was put an end to by the various Truck Acts of 1831, 1887, and 1896. In 1883 it was very properly declared illegal to pay wages in a public-house.

Again, in 1800 it was a crime for workmen to combine with the object of raising their wages: it was a crime to organize a strike: it was a crime for a workman to commit a breach of the civil contract between him and his employer. The Trades Union Act of 1871 legalised Trades-unions, though it did not incorporate them. And in 1875 the law of

[1] Merchant Seamen (Payment of Wages) Act, 1880, 43 and 44 Vict. c. 16.

Criminal Conspiracy was amended ; strikes and other combinations to raise the rate of wages are no longer illegal ; though rattening, intimidation, and picketing are forbidden.

### 7. *Animals.*

And the law has now extended its protecting care even to dumb creation. In 1800, every lawyer would have told you that an animal had no rights. Bear-baiting and cock-fighting were perfectly legal, though prize-fighting was always, in the view of the law, illegal—a rule which was inoperative in practice. And, as you know from Hogarth's pictures, acts of scandalous cruelty were constantly practised on animals of all kinds. In 1822 was passed the first measure restraining cruelty to cattle and beasts of burden—a measure due to the direct advocacy of Jeremy Bentham. In 1833 bear-baiting and cock-fighting were prohibited within five miles of Temple Bar ; not, be it observed, out of any regard to the comfort of those animals, but because such sports collected crowds of noisy and riotous persons, which interfered with the comfort of orderly citizens. In 1835 it was enacted that whoever put an animal in the pound must supply it with food ; he must not leave it there to starve. In 1849 two Acts were passed, one extending the Act of 1822 to any animal, the other dealing with slaughter-houses and insisting on more merciful ways of slaughtering animals. In 1849 was passed a general Act for the Prevention of Cruelty to Animals. In 1854 it was forbidden to use dogs to draw carts.

In 1876 was passed the first of the Anti-Vivisection Acts. Sea birds and their eggs are protected by the

Wild Birds Protection Acts, 1880 and 1894. In 1894 police constables were authorized to cause horses and certain other animals that are mortally injured to be slaughtered on the spot with as little pain and suffering as possible (57 and 58 Vict. c. 22). And this series of statutes passed to protect animals has been brought to a fitting culmination this year by an admirable Act brought in by my learned friend Mr. Greene, Q.C. It had been held in two cases that neither the Cruelty to Animals Act of 1849 nor that of 1854 protected wild animals in captivity, such as rabbits in a hutch or lions in a menagerie.[1] Hence the necessity for Mr. Greene's excellent Act, which enacts that any person shall be guilty of an offence who, whilst an animal is in captivity or close confinement, or is maimed, pinioned, or subjected to any appliance or contrivance for the purpose of hindering or preventing its escape, "shall, by wantonly or unreasonably doing or omitting any act,—

cause or permit to be caused any unnecessary suffering to such animal; or

cruelly abuse, infuriate, tease, or terrify it, or permit it to be so treated";

and shall on conviction be liable for every such offence to imprisonment, with or without hard labour, for a period not exceeding three months, or to a fine not exceeding five pounds, and, in default of payment, to imprisonment with or without hard labour.[2]

[1] *Aplin* v. *Porritt* (1893), 2 Q.B. 57; *Harper* v. *Marcks* (1894), 2 Q.B. 319.

[2] Wild Animals in Captivity Protection Act, 1900 (63 and 64 Vict. c. 33).

## *Legal Education.*

So much for the law. Now we turn to the lawyers. This is "the New Law List" for 1800. Compare it with the Law List for 1900; it is not one-sixth the size. In 1800 there were only 598 men at the Bar; now there are no less than 9457. In 1800 there were 17 serjeants-at-law and 25 king's counsel—all distinguished men; 556 junior barristers; and 172 special pleaders, conveyancers and equity draughtsmen under the Bar. To-day there is no serjeant left at the Bar; we have not even a Queen's Ancient Serjeant; no one has been appointed to that office since Serjeant Manning died in 1866. There are now 245 Queen's Counsel—all of course distinguished men; 9212 junior barristers; and 4 special pleaders and conveyancers not called within the Bar. There were about 4916 attornies-at-law in 1800, most of whom were also solicitors in equity; and there were 53 proctors, many of whom were also attornies. Now the number of solicitors exceeds 15,000.

In the year 1800 Henry Peter Brougham was admitted as an advocate at the Scotch Bar; and in the same year John Campbell was admitted as a student at Lincoln's Inn. Campbell naturally had wished to enter at the Temple, but there was no room for him there. "All my grand plan," he writes on October 4th, 1800, "about the Temple, alas! is knocked on the head. There is not a set of chambers to be had there, nor in any of the respectable inns." So he had to go to Lincoln's Inn. He puts a good face on his misfortune, as a brave lad should: "On the 3rd of November" he writes home, "I entered at Lincoln's Inn. This is the most expensive society, but the

most respectable, and therefore I prefer it." (Letter of December 7th, 1800.) He took chambers in 2, Old Buildings, Lincoln's Inn, at a rent of £22 per annum; "they are the cheapest in the Inn." He dined regularly in Hall at 4 P.M. There were generally about fifty students there. "We were allowed two dishes—fish and mutton, lamb and pigeon-pie, veal and pudding, etc., but no cheese and scarcely any vegetables. You may have both, but they charge you for them most iniquitously." Campbell drank nothing stronger than small beer on these occasions. For these dinners he paid 24s. a term; for that sum he might dine fourteen times, but he had to pay 1s. 6d. a day if he dined oftener. In 1803 he joined a Volunteer corps, "The Bloomsbury and Inns of Court Association." The rest of his time no doubt was devoted to studying law.

In those days the future barrister had to be a student under the Bar for five years before he could be called. And then apparently only eight students in each term could be called to the Bar by each Inn. So it was not till November 15th, 1806, that young Campbell was called to the Bar. During the first three years of his student life, he picked up what law he could by attending regularly in the Court of King's Bench. There was then "a box set apart for the students" there—an excellent custom which I should be glad to see revived—and there Campbell sat: see his letter of May 2nd, 1801. But early in 1804 he decided to go and read with Tidd, the author of *the* Practice. "Tidd is by far the best man in this line. He has constantly from ten to fifteen pupils" (January 2, 1804). And a very valuable pupil he proved to Mr. Tidd. But he is

shocked at the idleness of his fellows. "It is impossible for you to form any conception of the idleness of most of the nascent plea-drawers. They drop into the office for half an hour on their way to Bond Street. For weeks and months they remain away altogether. When they are assembled, the subjects discussed are not cases and precedents, but the particulars of a new fashion in dress, or the respective merits of the Young Chicken and Signora Grassini. I should work much harder, but I can get no one to keep me in countenance; and I should not like to become proverbial as a fagger. I believe there are at present twelve pupils upon the list, and of these there are really but two or three who apply with any steadiness, or who seem to feel any desire to improve themselves."

There was really no legal education at the Inns of Court in the year 1800. In the days of Queen Elizabeth and James I. regular courses of study were prescribed, attendance at moots and in hall was insisted on, and discipline was vigorously maintained. But that had all fallen into disuse, or lingered only in a few antiquated forms. There were still a few so-called "exercises." A student after dining in hall was provided with a printed form of questions. Armed with this, he would tremblingly approach the dais, and say to the first good-natured-looking bencher whose eye he could catch: "If A were seized in fee of Blackacre." The bencher smiled and bowed. The student continued the enunciation of the problem, concluding boldly with these words, which were not on the paper, "I maintain the widow shall have her dower." The bencher

bowed again, and the student retired, having "kept his exercise." Any student who had eaten the prescribed number of dinners and paid his fees was made a counsellor-at-law; the ceremony was conducted, like the return of stolen goods, "without any questions being asked"; he need never have read a single page of any law-book.

Now and then, apparently, a "moot" was held at New Inn for the benefit of such of the students of the Middle Temple as chose to attend. Samuel Ireland, in his *Historical Account of the Inns of Court*, published in 1800, "adverts" on page 105 to the "ceremony of mootyng" as "a custom long since in disuse except in New Inn, where about a year and a half since, we are informed, a mootyng took place, to the no small diversion of the passers-by, who, from the gesticulation of the head, and tremulous motion of the impassioned gentlemen then mootyng, began to conjecture that some dangerous malady had seized on the members of the Inn, particularly the ancients." The students had, in fact, to teach each other. There was in Tidd's office a society which met once a week, exclusively for the discussion of legal questions. It consisted of his pupils for the time being, and any former pupils who chose to attend. It was modelled upon the plan of the Courts at Westminster: there was a Chief Justice, counsel for the plaintiff and defendant, etc. And there a dry point of law, as Campbell writes on February 26th, 1804, was "agitated with as much keenness as if it had been some interesting point in literature or politics. An apt quotation from Lord Coke is heard with more applause than if it came from Juvenal or Cicero. . . . The great ornament of our Bar is a

Mr. Pepys" (afterwards Lord Cottenham). And among the former pupils of Tidd's who still attended these debates in 1804 were Denman and Copley. "The former in his argumentations was more eloquent and fervid than acute or learned, but he had always a fine gentlemanly port and bearing, which, with high principle, made him beloved and respected. When Copley took pains he argued most admirably, giving a foretaste of those powers which should have placed him in the first rank of lawyers, orators, and statesmen. His fault at this time (which he afterwards fully corrected) was being too loud and declamatory. I recollect that on one occasion his vehement tones being heard by the laundresses and porters in King's Bench Walk, a large mob of them collected round the window of the room in which we were assembled. This caused others at a greater distance to think that a fire had broken out, and messengers were despatched for fire-engines!" (*Lord Campbell's Life*, p. 140).

The articled clerks of attornies were still worse off. A friend has lent me a most interesting little book: "A Letter from a Grandfather to his Grandson, an Articled Clerk, pointing out the right course of his studies and conduct during his clerkship, in order to his successful establishment in his profession. By Jacob Phillips, of the Inner Temple, Esq., formerly an articled clerk. London: Printed for George Wilson, successor to R. Bickerstaff, corner of Essex Street, Strand, 1818." In this book I read on pp. 37-40:

> "The difficulty that now meets you is, how to obtain satisfactory information in answer to

this question, and here there is considerable difficulty; your tutor is probably always engaged in the hurry of practice, your brother clerk may not be competent to answer you, there is no applicable junior law-book to assist you, and you must make the best use you can of the books that are procurable. This is the general unaided state of a youth entering an attorney's office. No wonder that so many exclaim, '*Fateor, animus meus amisit me.*' It is impossible to conceive a more lamentable case, than a youth, just taken from school, glowing with admiration of the beauties of Grecian and Roman literature, set down to an attorney's desk to copy declarations and pleas, of all things the most contrary to his former pursuits. What then is he to do? Why, he must unlearn what he has learnt, he must lower his feelings and taste, and submit to grope on his way in darkness and ignorance, till nearly at the end of his clerkship he begins to catch some glimmering view of legal principles and science. But how much time is lost this while! How many, too, are left their whole lives in this career of ignorance, and though at first they entered their new pursuit full of ardour and eagerness to succeed, yet the constant drudgery of doing what they did not understand, turned the edge of their pursuit, and lost them to their profession. This has been the fate of many who will possibly read this work. What then is the remedy?

"The remedy is happily clear and certain, if it could but be adopted.

> "*Let there be a professional law school to take boys, from twelve to sixteen, eighteen, or twenty years old, and let them be taught the rudiments of law; and, indeed, let the older scholars go deeper into the subject. Let there be two courses of study—one for those intended to be attornies, and which would stop at sixteen; and the other for those intended for conveyancers, and which should go on to eighteen or twenty.*"

Since these words were written two important educational institutions have been established in London—the Incorporated Law Society in 1825, and the University of London in 1836. How far either of them has realised the ideal of this good grandfather, I will not say.

But it is a fact that there were very few text-books for law students in 1800; indeed there were very few law books at all, apart from the reports. I have before me a little work in two volumes called the *Bibliotheca Legum Angliae*, compiled by John Worrall and Edward Brooke, and published in 1788. The second volume gives a "General Account of the Laws and Law-writers of England, from the earliest times to the Conquest." I will read you the first two paragraphs to show you what unfounded romances were accepted as authentic history in those days.

> "It is said by those who have written of the antiquity of the laws of this kingdom, that Brutus, or Brute, the first king of this land, as soon as he had settled himself therein, for the safe and peaceable government of his people wrote a book in the Greek tongue, calling it the *Laws of the Brittons*, which he collected out

of the laws of the Trojans. (Pref. to 3*d. Rep.*) This part of our history is considered as deserving very little credit by Polydore Vergil, and the writers who have followed him, but it is said to be ably defended by Sir John Pryce in his *Defensio Historiae Brytanniae.* (Taylor on *Gavelk.* 84.)

"It is further related that Dunwallo Molmutius did constitute laws in Britain, which were thereupon called the *Molmucian laws;* amongst which it was enacted, 'That the cities and temples of the Gods, and the ways leading to them, as also the husbandmen's plows, should have the privilege of sanctuary.' This ancient King is also memorable as one of the first founders of our law, having first built at London the Temple on the spot on which the Church of the Temple now stands, the precinct of which he made a sanctuary or place of refuge. (Weever's *Fun: Monum.* 44.)"

And in the margin of each paragraph the exact date is given: A.C. 1103 for the laws of Brute the Trojan; and A.C. 444 for the Molmucian laws. It must indeed have been gratifying for the ancient Britons to have had their laws written out for them in excellent Greek! The Molmucian laws, we may infer, were written in Celtic, because on the next page we learn that "the old historian Gildas translated them out of the British language into Latin." This again would appear a work of supererogation, as the Romans had left Britain full a hundred years before Gildas was born! The only learned in the sixth century were the monks, who cared only for the law of their church.

But our author is more reliable in the field of modern legal history. On p. 233, I find an instructive account "Of the principal LITERARY WORKS on the LAW and CONSTITUTION which have been published within the present reign" (*i.e.* since 1760), an "Æra" which has been, he says, "peculiarly fertile in literary productions illustrative of our Law and Constitution." He mentions first *The New Abridgment*, then Fearne's *Contingent Remainders*, Cruise's *Essay on Fines and Recoveries*, Sir William Jones on *Bailment*, Cooke's *System of the Bankrupt Law*, Park's *System of the Law of Insurance*, De Lolme's *Treatise of the English Constitution*, Reeves' *History of the English Law*, Leach's edition of Serjeant Hawkins' *Pleas of the Crown*, Hargrave's *Law Tracts*, Buller's *Nisi Prius*, Mitford's *Treatise of Pleading in Chancery by English Bill*, and Mr. Morgan's *The Attorney's Vade-Mecum and Client's Instructor.* But there are no books for students, except Blackstone's *Commentaries* (which deservedly receive high praise), *Eunomus or Dialogues upon the Law and Constitution of England*, and "*The Elements of Jurisprudence*, being the preliminary part of a course of lectures by the present Vinerian professor, Dr. Woodeson." This last book I was curious to see. It has been unearthed for me in the Library of the Middle Temple, and here it is. Remember, please, that this is the only work on Jurisprudence mentioned in our *Bibliotheca;* there is, of course, no reference to either *A Fragment on Government*, or *An Introduction to the Principles of Morals and Education*, two heretical books published by one Jeremy Bentham in 1776 and 1780 respectively. Let us see what Dr. Woodeson taught his Vinerian students at Oxford

in 1783. Hear him first on the Law of Nature; for that was then a topic of the highest importance. Indeed, as you will see, the Natural Law takes precedence of the Divine Will!

> "The Natural law, investigated by the due exercise of the human faculties, and the Divine will, as it is expressly revealed, (both of which we contemplated in the first Lecture) are the most stable and essential grounds, the immutable parts, of the laws of England. Where the positive laws are silent, all courts must determine on maxims of natural justice, dictated by reason; that is, according to the law of nature. The necessity of recurring to primary principles of right and wrong is avoided, where the municipal institutions are express: it is then, in general, concluded, that they are founded on the law of nature, or contain nothing repugnant to it" (pp. 79, 80).

But the law of France at this time was very different, as it still is, from the law of England. Are we nevertheless to "conclude" that both are founded on the Law of Nature or contain nothing repugnant to it? Is there then one Law of Nature for France, and a different Law of Nature for England? Besides, we sometimes alter the law of England. Are we still to conclude that the altered law is also founded on the Law of Nature? Can Parliament repeal the Law of Nature? Oh no; for the Natural Law and Divine Will are alike "immutable"; we are told that in the first sentence.

Even worse is his account of the Original Social

Compact; for here the learned author knows that he is stating what is historically untrue. But that does not trouble him in the least.

> "However the historical fact may be of a social contract, government ought to be, and is generally *considered* as founded on consent, tacit or express, on a real, or *quasi*, compact" (p. 22).

You and I of course know that there never was any Social Compact or Contract; and, that being so, we decline to consider that civil government is founded on it. You and I know also that there is not, and never was, any such thing as the Law of Nature. There are only two kinds of law: the law of God and the law of Man. What mediaeval writers called the Law of Nature, and what philosophers now term "the moral law," are but man's imperfect conceptions of the law of God.

Immense steps have been made since the days of Dr. Woodeson in every branch of legal study. Our methods of investigation and education are far more simple and scientific; consequently our legal notions are clearer. We no longer accept historical untruths because we "ought" so to "consider." Legal fictions have well-nigh disappeared. You students of the Four Inns are now no longer taught that the law implies malice in every tortious act, that "a seal imports a consideration," that in every "direct and immediate" trespass "the law will imply violence though none is actually used."[1] To Bentham we mainly owe the beneficial changes in the substance of our law and procedure; to Maine the elimination

[1] Wharton's *Law Lexicon*, 1876, nom. "Trespass."

of historical falsehood; to Austin and Fitzjames Stephen the vast improvements in the form and style of our modern law books, and that clearness of thought and lucidity of expression which were rare indeed in the year 1800.

One word in conclusion. Of all the mighty changes that have taken place in the nineteenth century, the greatest change has been in the tone of the administration of both the civil and the criminal law. The manners of our law courts have marvellously improved. Formerly judges browbeat the prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duty. Formerly, too, counsel bullied the witnesses and perverted what they said. Now the attitude and temper of Her Majesty's judges towards parties, witnesses, and prisoners alike has wholly changed, and the Bar too behave like gentlemen. Of course if a witness is deliberately trying to conceal the truth, he must be severely cross-examined; but an honest and innocent witness is now always treated with courtesy by counsel on both sides. The moral tone of the Bar is wholly different from what it was when Bentham wrote: they no longer seek to obtain a temporary victory by unfair means: they remember that it is their duty to assist the Court in eliciting the truth. This is due partly to the improved education of the Bar; partly no doubt to the influence of an omnipresent press; but still more to Her Majesty's judges. If counsel for the prosecution presses the case too vehemently against a prisoner; if counsel cross-examining in a civil case pries unnecessarily into the private concerns

of the witness; a word, or even a look, from the presiding judge will at once check such indiscretion. Remember this, students of the four Inns, and wherever you may practise hereafter, whether in England or in India or in any of our distant colonies, remember ever to maintain the traditions, and to observe the unwritten laws, of a learned, a fearless, and an honourable profession.

W. Blake Odgers.

## II.

# CHANGES IN CRIMINAL LAW AND PROCEDURE SINCE 1800.

(Thursday, November 15th, 1900.)

THE changes made in Criminal Law and Criminal Procedure during the nineteenth century have been so numerous that I can only deal to-night with the most important of them. And even with that limitation, I feel that the subject of my lecture is so wide that I do not know where to begin, and I certainly shall not know where to end.

To go back to the beginning of the century is to go back, so far as the Criminal Law is concerned, to an age of barbarism. Look at the punishments which were inflicted on convicted prisoners.

The sentence on a traitor was that he must be drawn on a hurdle from the gaol to the place of execution, and when he came there he must be hanged by the neck, but *not till he be dead*, for he must be *cut down alive*, then his bowels must be taken out and burnt before his face, then his head must be severed from his body, and his body divided into four quarters, and these must be at the king's disposal.

If you would like to see the way in which that sentence was carried out you should refer to Townley's case, 18 State Trials, 350 and 351, in 1746. It was not until 1814 that this sentence was altered, and the traitor was hanged by the neck until he was dead, and disembowelling and burning were abolished, but the drawing on a hurdle, the beheading and quartering still remained part of the sentence.

In 1820 the Cato Street conspirators, Thistlewood and four others, were beheaded. After the hangman had done his work, a man in a mask went on to the scaffold and cut off the heads of the traitors and exhibited them to the public, and owing to the skilful performance of this duty he was supposed to be a surgeon. You may probably think that he was a butcher. (See 33 State Trials, 1566). The quartering however was remitted. The sentence pronounced on Frost, the Chartist, in 1839, was the same, but it was not carried out (4 State Trials, N.S., 86).

In 1870 the drawing on a hurdle, beheading, and quartering were abolished.

By an Act of 1848 some treasons may be treated and tried as ordinary felonies not capital. There is still on the statute book an Act of the reign of George the Third, which enables the monarch by warrant under his sign-manual, countersigned by a Secretary of State, to direct that the head of the traitor "shall be severed from the body whilst alive."

Before the century commenced, the punishment of women convicted of high treason was altered from burning to hanging.

A murderer after being hanged had to be dissected, or hung in chains in sight and view of the public,

whichever of the two the Court should order. In 1832 the dissection of the bodies of murderers was abolished, and in 1834 the hanging in chains was prohibited. It was the practice before the body was hung in chains to shave the head of the body, and to tar it in order to preserve it from the action of the weather. It was a common practice to hang the bodies of executed criminals in chains near the site where their crimes were committed. The bodies of pirates were generally hung in chains on the banks of rivers.

At the beginning of the century most felonies were capital. Down to 1808 the crime of stealing from the person above the value of a shilling was punishable with death. In 1810 Lord Eldon was alarmed by a Bill of Sir S. Romilly's, which had passed the Commons, to abolish the punishment of death for the offence of privately stealing in a shop to the value of 5s.; and in the debate in the Lords he prided himself on having left a man, who was convicted before him for stealing a horse of the value of 7s. 6d., for execution, on the ground that he was a regular horse-stealer. Up to 1811 stealing from bleaching-grounds was capital. In 1811 Lord Eldon again opposed "a dangerous Bill to take away the punishment of death from the offence of stealing in a dwelling-house to the value of forty shillings." Both Bills were of course thrown out in the Lords, and the result was that juries used to find that goods of the clear value of say £50 and upwards were under the value of 5s., so as to save prisoners from the punishment of death.[1]

Up to 1812 it was a capital crime for soldiers or seamen to be found vagrant without their passes, and

[1] See Lord Campbell's "Life of Lord Eldon" in his *Lives of the Chancellors*, vol. 7, p. 238.

up to 1823 it was also a capital crime for a man to fraudulently personate an out-pensioner of Greenwich Hospital or assume the name and character of one; and up to 1821 a fraudulent bankrupt was liable to be sentenced to death. About 1817 or 1818 hanging for forging bank-notes was discontinued. This reform was to some extent helped forward by a caricature by George Cruikshank, a copy of which you will find in that excellent book, *Old-Time Punishments*, by William Andrews. The last execution for *attempted* murder was at Chester in August, 1861.

Over 200 cases were capital at the beginning of the century, though many of these had fallen into desuetude. You will find further information on this subject in that valuable work, Walpole's *History of England*, vol. ii. page 58 and vol. iii. page 55. Now the only capital crimes are high treason, murder, piracy with violence, and setting fire to the Queen's ships, dockyards, arsenals, naval and military stores. Judgment of death may be recorded instead of being passed in all capital cases except treason and murder, and in such a case the prisoner is liable to be kept in penal servitude for life.

Up to 1824 persons who committed suicide were, in the event of a coroner's jury finding a verdict of *felo-de-se*, buried in cross roads with a stake driven through the body, as Thomas Hood tells us in *Faithless Nelly Gray*:

> "A dozen men sat on his corpse
> To find out why he died;
> And they buried Ben in four cross roads
> With a *stake* in his inside!"

In 1824 nocturnal interment without Christian rites was substituted for the old barbarous practice

of burial, but this mode of interment is also a thing of the past.

Transportation was not abolished until 1857. The pillory was another barbarous form of punishment which existed at the beginning of the century.

In 1797 the preacher, Thomas Evans, was pilloried for singing a seditious Welsh song; and Eaton, the publisher of Paine's *Age of Reason*, was also put in the pillory in 1812.

In 1814 Lord Cochrane and some of his co-defendants were ordered by Lord Ellenborough to be put in the pillory, but this part of the punishment was not carried out, as Sir Francis Burdett said that, "if Lord Cochrane was put in the pillory, he would stand by his side."

This punishment was in 1815 abolished in some cases, but it was not finally abolished till 1837, and as late as 1830 a man was actually put in the pillory for perjury.

The mob took part in this punishment, for a man in the pillory might be cheered, or covered with rotten eggs and garbage; and sometimes he was seriously injured. When Dr. Shebbeare was put in the pillory at Charing Cross in 1758 for a seditious libel, an umbrella was held over him by an Irish chairman, and he was cheered by the crowd as the "British champion," and the Under-Sheriff was severely punished for not properly carrying out the sentence.[1]

There is an instance in 19 State Trials, page 809, in 1755, of two men having been convicted of murder and executed for killing a man in the pillory; and yet Lord Thurlow said that "the pillory was the restraint against licentiousness provided by the wisdom of past ages"!

[1] *Dictionary of National Biography*, vol. 52, p. 2.

The ducking stool was the punishment generally inflicted on a common scold convicted of nuisance. The latest recorded instance in England occurred at Leominster in 1809; and as late as 1817 a woman was wheeled round a town in the chair, but not ducked, as the water was too low.

In 1820 whipping of females was entirely prohibited. The only whipping now allowed is under the Vagrant Act of 1824, by which an incorrigible rogue (not being a female) can be sentenced by the Quarter Sessions to be whipped, and also under what is known as the Garotters' Act of 1863, and under the Act of 1842 for molesting the Queen by striking her, pointing a pistol at her, etc., and in two other cases. There are several statutes, however, authorising the birching of juvenile offenders.

The last instance of a person having been put in the stocks was in 1872, and this mode of punishment is not entirely removed from the statute book. There are some other old forms of punishment which have ceased to exist, and I would again refer those interested in the subject to Andrews's *Old-Time Punishments*.

I should now like to call your attention to a trial for murder early in the century. On Monday, the 11th May, 1812, at five in the afternoon, Bellingham shot Mr. Spencer Perceval (who was then Prime Minister and Chancellor of the Exchequer, and who had been Attorney-General) in the lobby of the House of Commons. On the same day he was committed for trial to the Sessions at the Old Bailey, which were then being held. On Friday, the 15th, he was put at the bar to be tried. His counsel, Mr. Alley, applied on affidavit for a postponement of the

trial on the ground that time was required to get witnesses to prove that the prisoner was insane. The application was refused. At the end of the case for the Crown the prisoner was called upon for his defence, and he then, pointing to his counsel, said: "Is not that gentleman going to speak for me?" On being told that the law did not allow this, he defended himself.[1] He was convicted, and sentenced to be hanged on the following Monday, the 18th, and his body was ordered to be dissected. After the execution on the Monday the body was taken in a cart to St. Bartholomew's Hospital to be dissected. This was a trial in a panic, and it is interesting to compare it with the case of M'Naughten, who, on 20th January, 1843, shot Mr. Drummond, Sir Robert Peel's Private Secretary. At the February Session the trial was postponed in order to enable the prisoner to get his witnesses, and on the 3rd and 4th March the trial took place, when, after an eloquent speech by Mr. Cockburn, and the examination of the prisoner's witnesses, the jury returned a verdict of "Not Guilty, on the ground of insanity" (4 State Trials, N.S., 847). You should study that case, as it contains all the law relating to insanity in criminal cases. In 1883 the form of the verdict in cases of insanity was slightly altered.

In 1868 public executions were abolished in murder cases, but not in other capital cases. Before this the crowds were so great that persons were not infrequently crushed to death; and Mr. Charles Dickens in 1849 mixed with the crowd, young and old of both sexes, on the night before the execution of Mr. and Mrs. Manning, and described in letters to the

[1] See *post*.

*Times*, as he only could describe them, the awful scenes which occurred of profanity, indecency, ribaldry, and brutality, and yet it was not, as I have said, until 1868 that this salutary change in the law was carried out.

I must now deal with the Prisoners' Counsel's Act, 1836. A prisoner charged with high treason was allowed to have two counsel to address the jury for him, and was also allowed to address the jury himself after his counsels' speeches. You should refer to Frost's case in 1839, and to Lord George Gordon's case in 1781, 21 State Trials, 486. In cases of misdemeanour one counsel was allowed to address the jury for the defendant, but in cases of felony a prisoner's counsel was only allowed to cross-examine witnesses and to argue points of law and to examine witnesses for the defence, and he could write a defence for the prisoner. In 1826 Sydney Smith wrote an article on the subject in the *Edinburgh Review*, which is reprinted in his works, and after reading it it is difficult to understand how the law could have remained unchanged until 1836; and it is also an astounding fact that 12 out of the 15 judges strongly condemned the Bill, and one of them, Mr. Justice James Alan Park, wrote a letter to Sir John Campbell, who was the Attorney-General, stating that if the Attorney-General allowed the Bill to pass he would resign his office. Well, the Bill did pass, but the learned judge did not resign!

In 1865 Mr. Denman's Act further improved the procedure in criminal cases by allowing a second speech to the prosecuting counsel in cases defended by counsel, and by allowing a prisoner or his counsel a second speech in case he called witnesses in order

to sum up the evidence given for the defence. In the case of Palmer, the poisoner, tried in 1856, the prisoner's counsel had no opportunity of making a second speech, although the evidence for the defence given by experts and others had occupied the Court for three days.

The right of the prisoner to have a copy of the depositions of the witnesses examined against him before the committing magistrate must not be omitted.

I will now point out some small changes in the Jury laws. A jury on a trial for High Treason or Felony was not allowed to separate. In 1897 an Act was passed to enable the Court to allow juries to separate in all felonies, except High Treason, Murder, and Treason-Felony, in the same way as they were entitled to do in cases of Misdemeanour. I have seen at the end of the first day's trial for embezzlement the jury locked up for the night, and the prisoner let out on bail.

The Bailiff in charge of a jury was sworn to keep them "without meat, drink, or fire," etc., and on one occasion one of the jury asked the bailiff for a glass of water. The bailiff came into Court and asked Mr. Justice Maule if he might give the jurymen water. "Well," said the judge, "it is not meat, and *I* should not call it drink; yes, you may." But now, under the Juries Act, 1870, the judge may allow the jury at any time the use of a fire, and they may, at their own expense, have reasonable refreshment, so that Pope's lines are no longer applicable:

> "The hungry judges soon the sentence sign,
> And wretches hang that jurymen may dine."

An alien was entitled to a jury *de medietate linguæ*, half English and half foreigners. When, however, an alien was told that the half might not contain any of his own countrymen, he seldom availed himself of his right, and capital was often made out of this. The alien's counsel would say: "Gentlemen of the jury, the prisoner might have claimed a foreign jury, *but* he relies upon an English jury." In 1858, Dr. Bernard (the Orsini Conspiracy Case), 8 State Trials, N.S., 900, when told of his right, said, pointing to the jurymen in the box: "I trust with confidence to a jury of Englishmen," and he did not trust in vain. Sometimes the mixed jury was claimed in order to get a separate trial, as in 1849, in Manning's case. Mr. and Mrs. Manning were jointly charged with murder. Mr. Manning's defence was that his wife alone committed the murder, and her defence was that her husband was the sole culprit. As she was a Swiss she claimed a mixed jury, which, if allowed, would have ensured for her a separate trial. It was, however, held that as she had married a British subject she had become thereby a British subject, and so they were both properly tried together. (7 State Trials, N.S., 1029.) By the Naturalization Act, 1870, the Jury *de medietate linguæ* was abolished.

There is one jury which has not, however, been interfered with—that is the jury of matrons. In 1847, Mary Ann Hunt was convicted of murder at the C.C.C., and at the following Session a jury of matrons was empannelled to try whether the convict was "with child of a quick child," and the matrons, after searching and examining her, returned a verdict that she was not, and she was left for execution; but

the Surgeon of Newgate reported to the Home Secretary that she *was* quick with child, and he, with wisdom equal to that of Solomon, said that a few months will settle this question, and her sentence was consequently respited, and after a few months she was delivered in Newgate of a fine child; see 2 Cox's Criminal Cases, 262, and the C.C.C. Sessions Papers for 1847. Notwithstanding my enthusiastic reverence for trial by jury in criminal cases, I should not regret to see the abolition of the Jury of Matrons; but who dare propose such an interference with the rights of women?

The principal Evidence Acts of the century must now be referred to. The rules of evidence in civil and criminal cases were the same, and such rules were established by our ancestors as the most suitable for arriving at the truth. No one who had been convicted of crime, or who had any pecuniary interest in the result of a trial, could give evidence, and constant failures of justice took place in consequence of the incompetency of such persons. In 1828 the first blow was struck at this absurd rule. It was then enacted that the person whose name was forged should be a competent witness in prosecutions for forgery and uttering forged documents, notwithstanding that such person had an interest in the deed, writing, etc., alleged to be forged. Afterwards, in 1843, Lord Denman's Act rendered competent as witnesses all persons who had an interest in the trial or who had been convicted of crime, leaving the jury to judge as to their credibility. He had advocated this reform first in an article in the *Edinburgh Review* of 1824. The Evidence Acts of 1851, 1853 (Brougham's Acts), and of 1869, rendering parties

to suits and their husbands and wives competent witnesses, did not apply to criminal cases. I will therefore leave Mr. Blake Odgers to deal with them in his lecture next term.

From 1872 to 1897 about twenty-six Acts were passed enabling accused persons in certain cases to give evidence: but at last came Lord Halsbury's important Act of 1898, which made an accused person and the husband and wife of such person *competent* witnesses, and which regulated the procedure as to their examination. That Act is so plain and clear that I need not detain you by enlarging on its provisions. I will only say that all the predictions of its opponents have been falsified, and that it works admirably.

Altogether there have been more than fifty Acts passed in the century which contain provisions to amend the law of evidence. In 1828, 1854, 1861, and 1888 Acts were passed substituting affirmations and declarations for oaths, and enabling persons with no religious belief to give evidence, and in 1885 it was enacted that a child who did not understand the nature of an oath might in certain cases give evidence if such child understood the duty of speaking the truth. We now have after many struggles an open witness box, and the juries are at last left to determine on the truth or falsehood of the evidence from whatever source it may come.

The number of new offences which have been created during the century is so great that I can only mention a tithe of them. As all felony by the Common Law includes trespass, if the party be guilty of no trespass in taking the goods he cannot be guilty of carrying them away, and another rule was that

one who has the actual possession of goods by delivery cannot be guilty of felony in embezzling them afterwards. It became necessary therefore to supplement the Common Law, and to deal with the fraudulent persons who escaped punishment under that Law by passing statute after statute. Their name is legion they are so many. I must give you a few examples:

In 1757 it was made an offence to obtain "goods, ware, and merchandise" by false pretences, and it was not until 1812 that the obtaining valuable securities by false pretences was made an offence. It was truly said in a statute passed in 1827 that "a failure of justice frequently arises from the subtle distinction between larceny and fraud," and many of these subtle distinctions have been removed.

Special provisions were made to deal with frauds by attorneys, agents, bankers and factors, and by bailees, trustees, and others.

In 1868 it was made a felony for a joint owner of property to appropriate to his own use the whole of such property. In 1882 a husband was made liable in certain cases to be indicted for stealing the property of his wife, and the wife for stealing the property of her husband. Special provisions were also made from time to time to punish the wilful and malicious damage to both real and personal property. The fraudulent falsification of accounts was made an offence in 1875. False and deceitful personation was made a felony in 1874. Forgery by the Common Law is only a misdemeanour, but a large number of forgeries were made felonies.

Is it not almost incredible that trustees who defrauded persons entitled to the benefit of the trust were not made amenable to the Criminal Law

until 1857. I have had to advise in some cruel cases in which a trustee has fraudulently misappropriated the whole trust fund, that no criminal proceeding could be taken against him, and that the injured persons must go for a remedy to the Court of Chancery, but as was said on one occasion: "Surely, Sir, you would not send a fellow-creature there." In the same year, 1857, a bailee was for the first time made liable to be convicted of larceny for stealing the property of the bailor.

I have not time to deal at any length with the important Libel Acts of 1843, 1881, and 1888. It was, you will remember, by Lord Campbell's Libel Act of 1843 enacted that the publication of a libel should no longer be a misdemeanour if the defamatory matter was true, and if the publisher could show that it was for the public benefit that such matter should be published. This is, I believe, the only case in which two pleas can be pleaded at the same time in answer to an indictment, viz.: "Not Guilty," and a justification.

The following Acts passed during the century speak for themselves: the Woollen and Hosiery Act, the Merchandise Marks Acts, the Sale of Offices Act, the Official Secrets Act, the Foreign Enlistment Act, the Explosives Acts, the Slave Trade Acts, the Merchant Shipping Acts, the Obscene Publications and Advertisements Acts, the Fraudulent Debtors Act, the Acts for Prevention of Cruelty to Women and Children and Animals, the Betting, Gaming, and Lottery Acts, the Corrupt Practices Act, and the Conspiracy and Protection of Property Act. By all of these Acts and others to which I do not think it worth while to refer, crimes were created; as the

common law did not adequately deal with the case. There is one, however, which I ought specially to mention relating to dogs. A dog being in law an animal of a "*base nature*" is not the subject of larceny at common law, but dog stealers can now be properly punished under the statute law. Fancy a lady's pretty pet poodle, shaved and curled, worth £5 or £10 being an animal of a base nature!

In 1817 rewards for convictions, called "blood-money," were abolished. In 1827 an Act was passed to prevent spring-guns and man-traps being set on land.

I should like before turning to another subject to draw your attention to the Territorial Waters Jurisdiction Act of 1878 which gets rid of the decision in the Franconia Case—*R.* v. *Keyn*, 2 Exchequer Division 63. In that case a German was convicted at the Central Criminal Court of manslaughter within the territorial waters. Seven of the Judges held that the conviction was wrong, and six were of opinion that it was right. The Act declares the law in these terms: "Whereas the rightful jurisdiction of Her Majesty, her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions." The law upon this subject is made clear by this Act, and is in accordance with the view expressed by the minority of the Judges.

I ought not to omit to refer to the Reformatory and Industrial School Acts, the First Offenders Act, and the Prison Acts relating to the better classification of prisoners.

The Vexatious Indictments Acts now prevent a Bill of Indictment being preferred behind a prisoner's back in certain cases.

Before the establishment in 1848 of the Court for the Consideration of Crown Cases Reserved the Judge trying a case at the Old Bailey or on Circuit used, when a difficult point of law arose, to state a case for the opinion of his brother judges. They then sat together at Serjeant's Inn and heard the arguments of counsel, if any had been instructed. The counsel were, however, only there in the nature of *amici curiæ*. The judges could give no judgment, but if they came to the conclusion that the conviction was wrong in point of law, the Judge who tried the case recommended the Crown to grant a pardon. It will interest you to look through the reports of the criminal cases before that date. In Frost's case the judges, owing to its importance, sat in the Court of Exchequer in the day-time, but they often sat after dinner at Serjeant's Inn. See 4 State Trials, N.S., 461, 479.

The judges, however, refused to give any opinion on a case reserved by the Recorder or the Chairman of Quarter Session, and even now there is no power to compel any of these persons to state a case on a point of law raised before them.

Since 1870 the forfeiture of lands and goods no longer follows a conviction for treason or felony.

In order to avoid forfeiture, persons in danger of conviction of felony used to transfer their property by deed in the hope that such deed would not be disputed by the Crown. See Lord Cardigan's case for an instance of this being done. 4 State Trials, N.S., 666, note (a).

I must not omit to mention the two Extradition Acts of 1843 relating to France and the United States, the former applied only to the crimes of murder, of an attempt to commit murder, of forgery, and of fraudulent bankruptcy, and the latter to the crimes of murder, of assault with intent to commit murder, of piracy, arson, robbery, forgery, and the utterance of forged paper. The Extradition Acts of 1870 and 1873 embrace all these cases, and apply also to all crimes of a serious character. Under these Acts, which regulate the procedure, a man cannot be extradited unless the evidence given before the committing magistrate is such as would justify a committal for trial in this country had the offence been committed here, and when given up for a particular offence he can only be tried for that offence, and no one can be given up for a political offence.

We have now extradition treaties with every civilized country, the last one being with that little Republic, San Marino. Dr. Johnson wrote that :

> "London : the needy villain's gen'ral home,
> The common-sewer of Paris and of Rome ;
> With eager thirst, by folly or by fate,
> Sucks in the dregs of each corrupted state."

The Extradition Acts have done something to remedy this state of things, but many persons think that an Alien Act is also wanted, as between January 1st, 1897, and November, 1900, about 190,000 aliens arrived in the United Kingdom from the Continent, exclusive of seamen and of persons stated on the alien lists to hold through tickets to other countries, many of whom were miserably poor, and

of those who remained in this country many were very undesirable visitors.

The Fugitive Criminals Act of 1881, which applies to Great Britain and the Colonies, must also be mentioned.

Some offences have, of course, dropped out of the statute book. I will give one instance, viz., that of "*Owling*," named after the bird sacred to Minerva. It consisted in the clandestine transportation of wool or sheep out of the country.

Appeals of murder and trial by battle were abolished in 1819, and, strange to relate, Lord Eldon concurred in this reform. Thornton's case in 1818, reported in Woodall's "Celebrated Trials," is the last case of this remnant of Gothic jurisprudence. Benefit of Clergy was abolished in 1827.

Hundreds of offences created by statute and by-laws have been made punishable on summary conviction, and it is only necessary to refer on this subject to the Vagrant Acts of 1824, the Metropolitan Police Acts of 1839, and to the Town Police Act of 1847, and to the Acts which are known as the Summary Jurisdiction Acts of 1848, 1879, and 1884. There is an appeal given in certain cases against a summary conviction, and a ready mode is provided for correcting the decisions of justices which are erroneous in point of law.

Considerable alterations have been made in the law to prevent the failure of justice on technical points. I need only refer to 7 Geo. IV. c. 64, sec. 20 (1826), since re-enacted in Lord Campbell's Act of 1851 (14 and 15 Vict. c. 100), the preamble of which is as follows: "Whereas offenders frequently escape conviction on their trials by reason of the

technical strictness of criminal proceedings in matters not material to the merits of the case."

I must give you a few instances. Lord Cardigan was in 1841 indicted for shooting at Harvey Garnett Phipps Tuckett with intent to murder him, and with intent to do him grievous bodily harm. It was clearly proved at the trial that his lordship in a duel deliberately shot at Captain Harvey Tuckett, but the Crown failed to prove that the Captain bore the name of Harvey Garnett Phipps Tuckett. The Lord High Steward, Lord Denman, and the peers therefore found Lord Cardigan "Not Guilty." The Duke of Cleveland relieved his conscience by saying "Not Guilty *legally*." 4 State Trials, N.S., 602.

Here is another case. In 1829 one Puddifoot was indicted for stealing a sheep. The proof was he stole an ewe, but as the statute used the word "ewe" as well as "sheep," the conviction was held by the Solons of Serjeant's Inn to be wrong, and the prisoner, who had been sentenced to death, was pardoned. In 1843, in the case of *R.* v. *O'Connor*, the indictment contained in the margin the words "the County of Lancaster," but it was quashed because in the body of the indictment it did not state the county where the offience was committed. 5 Queen's Bench Reports, 16.

If a man was indicted for larceny he could not be convicted on that indictment of an attempt. If a man was indicted for larceny, and it turned out that the offence was embezzlement, he was acquitted, and *vice versâ*. Again, if a man was indicted for larceny, and it turned out that he did not steal the property, but received it with a guilty knowledge, he was acquitted, and *vice versâ*.

An amusing case occurred at the Kent Sessions some years ago—before you could include in one indictment a count for stealing and a count for receiving. A man was indicted for stealing property, and the counsel who defended him told the jury that they could not convict the prisoner if they thought that instead of stealing the property, he received it with a guilty knowledge. The jury were of opinion that he received the property, but did not steal it, he was therefore acquitted. At the next Sessions the man was indicted for receiving the property. The same counsel defended him, and he then told the jury what was perfectly right—that if they thought that the prisoner stole the property they could not convict him of receiving it. The jury stated that they thought the prisoner stole the property, and accordingly he was again acquitted. Now, alas! gentlemen, owing to the amendment of the law, when you go Sessions you will not be able to distinguish yourselves in that way.

In 1827 Mr. Justice Buller quashed an inquisition for murder, because it said that the jurors on their oath present instead of "On their *Oaths*," but this is now all altered.

But let criminal pleaders even now beware of "sloppy inaccuracy," for if the word, "Traitorously or feloniously," should be left out of an indictment it would be quashed. See *Reg.* v. *Gray*, Leigh and Cave's Crown Cases, 365. The Act of 1851 also materially shortened the length of the indictments.

The indictments for murder and perjury used to present that the prisoner "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," did, etc. But criminal

pleaders dismissed the devil from their indictments long before the celebrated judgment of Lord Westbury in the Privy Council in the case of *Williams* v. *Bishop of Salisbury*.

The indictment for murder had formerly to describe how the death was caused, now it is in three lines.

The amiability of our law up to 1827 was such that if a prisoner would not plead he was liable to be pressed to death by the genial process known as "peine forte et dure." I am glad they give this process a foreign name. Now, if he stands mute of malice, or refuses to plead on any ground, a plea of "Not Guilty" can be entered for him.

The judges of old were under the impression that if a criminal trial could be finished in one sitting it ought to be so finished.

Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 a.m., the court having sat from 8 a.m. the previous day. In 1794, in Hardy's case, the court sat from 8 till past midnight. In Lord Cochrane's case the counsel for the defendants made their speeches from 10 p.m. to 3 a.m.; and when Lord Ellenborough adjourned the court he told the jury that, owing to the late sitting, they need not attend again until 10 a.m. In 1847 I heard part of a trial for murder, before Mr. Justice Erle, in the C.C.C., which lasted from 10 a.m. until midnight. If some of the old judges who were accustomed to sit at 8 in the morning till past midnight were to know of the present sittings, from 10.30 a.m. to 4 p.m., would they not think that the lawyers of the present day were a degenerate race?

There were only two circuits a year, in the early spring and in summer, and prisoners were often kept in custody five, six, seven, and even eight months before trial. There are now in every county three circuits a year, and in some places four in the year, but it is desirable to hold more frequent assizes when this can conveniently be done.

Additional power was given to justices by the Act of 1898 to admit prisoners to bail.

A Director of Public Prosecutions was appointed in 1879.

There is a branch of the law in which great changes have been made, namely, the power of arrest, with and without warrants, and the power of issuing search warrants. I can only mention the subject, as much time would be required to deal with these changes.

I should recommend you to look through Peel's Acts of the seventh, eighth, and ninth years of the reign of George IV., notwithstanding they have been repealed, and to compare them with the Acts of 1851 and with the five Consolidation Acts of 1861.

The Central Criminal Court Act was passed in 1834, which gives jurisdiction to that Court over all the county of Middlesex, all the City of London, and over part of Surrey, Kent, and Essex; and the Court holds twelve sessions a year, and it can try cases removed to it under Palmer's Act (1856), when "it is expedient to the ends of justice" that this should be done. You will find an interesting account of this, the greatest criminal court in the world, and of the after-dinner sittings in days of old, in 6 State Trials, N.S., 1135; and at page 1139 there is an account of the good old practice of two or three judges sitting together to try cases.

Law reformers have during the century been engaged in "breaking down the bulwarks of the Constitution," as some old lawyers described the abuses which have been happily now swept away.

In comparing the state of the criminal law at the beginning of the nineteenth century with its state at the end thereof, we must not omit to recognise the services rendered to the State by the great law reformers, Jeremy Bentham, Sir Samuel Romilly, Sir James Mackintosh, Sir Robert Peel, Lord Brougham, Lord Denman, and Lord Campbell. I speak only of the dead.

In doing this, however, we must not forget that our criminal law and procedure is yet capable of considerable improvement.

Mr. Justice Wills, in a case "In Re Bellencontre," 1891, 2 Q.B. 141, said: "I am reminded of a circumstance that was mentioned to me some time ago by a friend very well versed in the English Criminal Law. In the course of his studies he made out a list of the iniquitous things that could be done by that law without bringing the man under the provision of the common or statute law, and he had had it in his mind at one time to publish it, to show how defective the law was, but he forbore on grounds of public policy to call attention to what people might do without rendering themselves liable to punishment." Since that list was made many defects have no doubt been remedied, but some remain. I will follow that learned person's example, and not refer to them. Moreover, I do not appear before you to-night as a law reformer, but simply as a lawyer who has had some experience in the criminal law and its administration, to tell you of, or rather to call to your recollection, the changes

and improvements made in that branch of the law during the century now drawing to its end—a task which I fear I have performed in a very discursive manner.

I have pointed out to you the severity of our law at the beginning of the century, and I need not refer to its mildness at the end. We have at last learnt the great lesson which Dr. Paley taught more than a hundred years ago, that the certainty of punishment is more effective than severity.

We have now no gagging laws, we possess the right of free speech and the right of holding public meetings, and the press is absolutely free. We are enjoying what I hope it is not a boast to call British civilisation and British liberty, and we are protected by impartial laws and the purest administration of justice.

I cannot conclude without thanking you for the attention with which you have honoured me, nor without wishing you success in that noble profession to which we are all proud to belong.

HARRY BODKIN POLAND.

## III.

# INTERNATIONAL LAW, PRIVATE AND PUBLIC.

(Thursday, November 22nd, 1900.)

THERE are those, gentlemen, who will tell you that, of the two subjects about which I am to speak to-night, one is not International and the other is not Law, and that the two are only related to one another by the fact that to each the phrase "International Law" is misapplied. Some folks, otherwise sane by reputation, disagree with these criticisms altogether. As, however, there have been a hundred years in the century now closing, and as there are only sixty minutes in the hour now beginning, I will for the present neglect these controversies, though they possess more practical importance than most wars about words.

Let us begin with that one of the two branches of International Law which I think is the elder, Private International Law. It arises from the fact that there are in the civilised world various jurisdictions, each with its own body of laws. If there were no intercourse between the inhabitants of different countries there would be no need for Private International Law.

But of course this is not the case in the world in which we live. The interests of individuals transcend the narrow limits of territorial jurisdiction and of nationality. The Jew *will* trade with the Greek; wherever he can, too,—if not in Egypt then in the parts of Libya about Cyrene: strangers from Rome will make their appearance in Cappadocia and even marry there. In consequence cases are continually occurring which demand that the territorial court before which they come should apply to them some other than its own narrow local system. The Egyptian Court, for example, if called on to consider the Jew's bargain with the Greek, may have to reckon with the personal law of the Jew, or with the law of Libya where the contract is to be performed: the validity of the marriage in Cappadocia may be held in Gaul to depend in part on the laws of Cappadocia and in part on the personal law of the Roman husband. It would of course be possible for a territorial court to refuse thus to recognise the legal systems of other territories, but as a matter of fact this is not done, and we need not trouble about the possibility. Thus arises a body of law which is sometimes called Private International Law and sometimes the Conflict of Laws. Of the two names I prefer Private International Law, and we will use that name to-night, but in using it you must be careful not to be misled by the latter half of the word "International." Our subject is due to the variety of separate jurisdictional areas in the world, and these separate jurisdictional areas are by no means always coincident with national or state territory: thus England is in this sense a distinct jurisdiction from Scotland, New South Wales and Quebec and the

Cape Colony are distinct from both ; yet all five are but parts of one personality from the true international standpoint.

On the Continent, Private International Law is, speaking generally, viewed differently from the way in which it is viewed here. There, the tendency is to regard it as a genuine *jus gentium*, forming part, doubtless, of the Law of any given state, but doing so by virtue of its own inherent claims and merits, and not because of any concession on the part of the individual system which incorporates it. We, however, and the "we" may be a very big one, for it includes, practically, the English-speaking world, treat Private International Law as essentially a branch of municipal law; we English consider the rules which we apply to the competition of legal systems to be as strictly English Law as our Law of Real Property, and any airs which Private International Jurisprudence may give itself by reason of its second name are effectually chilled—by the White Book! Our judges have, it is true, occasionally dropped hints concerning the existence of a general private law of nations; but if you read, *e.g.* what Lord Selborne said on p. 513 of 10 Appeal Cases, or what the then Lord Justice Lindley said in L.R. (1892), 1 Ch. D., at p. 226, you will see that our judges will have nothing to do with any so-called "Common Law of Europe" in this matter: they see Law steadily, but a continental critic would say they do not see it whole.

The next general remark which a review of the century suggests is this: that practically the whole body of English doctrine concerning Private International Law has been evolved in this century. And,

coupled with that, is the fact that the evolution has been almost entirely the work of the Courts. We have in this country to-day two great organs of Legislation—Parliament and the Courts (with an understanding, of course, that in the event of dissonance the voice of Parliament prevails). Parliament has done little for our science; and, to judge by some of the things which it has done, its abstention has not been an unmixed evil. For example, it passed in 1861 an important Act (commonly known as Lord Kingsdown's Act) "to amend the Law with respect to Wills of Personal Estate made by British Subjects"; yet no one to this day knows whether "personal estate" here includes leaseholds, and, despite the title of the Act, one of its five sections deals (in terms, at any rate) with all wills, *i.e.* with wills of other than British subjects. Parliament has also passed certain Bankruptcy Acts in such terms as to apply in part to the Colonies, with the result that the following case has occurred. A person whose domicile of origin was English, was a member of an Australian firm; he became bankrupt in Australia, owing large sums to Australian and to English creditors, but he could not obtain a discharge in Australia. The frontal attack having thus failed, he took the Law in the flank by coming to England, becoming a bankrupt here and obtaining here a discharge (subject only to a short period of suspension). This flank attack succeeded because, by imperial statute, the English discharge operated on *inter alia* the debts due to the Australian creditors, who could only at great expense have taken part in the English proceedings. From these illustrations we gather that it is not wholly a misfortune that the development of

our Private International Law has been largely left to the Courts.

That work has been accomplished almost entirely in the present century. We are apt to forget how very young we are in the domain of scientific law—how young it is difficult to realise without a comparison of ourselves in this respect with other nations. An Englishman, Jeremy Bentham, invented the word "International," but—praetermitting writers of our times—that almost exhausts our contribution to International Law. Until the present century the authoritative text-writers upon Public International Law are Dutch, Italian, Spanish, French, Swedish, Swiss—anything but British. Similarly in Private International Law. Until this century it does not seem to have entered into the head of any Englishman that there was such a branch of law as this worthy of separate treatment, nor was there a single work on the subject in our tongue.

Our case-books show that questions of Private International Law had now and then been before our practitioners and judges during the first half of the 18th century. We find, *e.g.* decisions upon questions of jurisdiction such as nowadays make their way into English treatises on Private International Law: thus in 1730 it was decided that a foreign Corporation—the Dutch West India Company—might sue in England, and in 1750 came that great case, *Penn* v. *Lord Baltimore*, which allowed even foreign land to be dealt with in our courts, provided its owner was within the jurisdiction, and therefore amenable to the gentle pressure of attachment. Very elementary matters were, however, considered as open questions in that century. In 1743 Lord Hardwick

decided, in connection with property in London belonging to a deceased Jerseyman, that movables are distributable on intestacy according to the law of the deceased owner's domicil and not according to the *lex situs* (*Pipon* v. *Pipon*, Amb. Rep.). In 1752, in a case where two English people had 'married' in Paris but not in French form, an elaborate judgment was thought necessary in order to establish a proposition which had been adopted for centuries on the Continent, namely, that the *lex loci contractus* regulates the validity of contracts so far as form is concerned (*Scrimshire* v. *Scrimshire*, 2 Hagg.): and later in the 18th century one or two other cases of equal importance to our subject were decided. With these stray exceptions, however, the whole of our Private International Jurisprudence is the product of this, the 19th century.

It is not easy to find an explanation of the tardiness of this development, for a considerable literature on the subject had long previously existed on the Continent. In the year 380 A.D. the emperors of the Eastern and Western Empires issued an edict, in which they ordered ('volumus') that all people under their sway should follow the religion delivered by Peter to the Romans. This decree is the first in the first book of Justinian's *Codex*. Its opening words are: "Cunctos populos," "all people." It is in the shape of comments on the words *cunctos populos ... volumus*, suggesting as they do questions about the relations of jurisdiction and space, that the literature of Private International Law begins. At some uncertain date a glossator wrote thereon, "If a citizen of Bologna comes before a court at Modena, the case is not necessarily to be governed by the law of

Modena." This gloss was, in the century ending A.D. 1350, expanded into something approaching a system by jurists of N. Italy and S. France, of whom Bartolus may be taken as the representative. The words of Gratian begat a gloss, the gloss begat a chapter, and the chapter became a library. But five centuries were to elapse before any Englishman contributed to that library. You will find in those centuries treatises by Frenchmen and Dutchmen but none of ours; and when, towards the close of the last century and in the earlier part of this, English lawyers had to deal with the, to them, novel problems of Private International Law, it was especially to writers of the Dutch school who flourished during the reign of our Charles II. that they turned for guidance. At a moment like the present when the Dutch are not the best of our friends, it becomes almost a duty for an Englishman, surveying the progress of civilisation from the impartial platform of International Law, to recognise with a word of gratitude the pre-eminent services of the Dutch. We connect—perhaps a little too exclusively—the beginning of Public International Law with the name of Grotius—Grotius to the world but to the Dutch de Groot: but we do not all know of the almost equally fertile labours, in the domain of Private International Law, of Huber and the Voets and other Dutchmen.

The present century has, however, seen the beginning and the wonderful development of our English system of Private International Law. After 1815 peace went hand in hand with increased wealth, steam shortened distances, English people became *the* travellers of the world, our commercial relations

penetrated everywhere. We had come out of the long War of Expansion to find in our empire many local territorial jurisdictions with diverse legal systems incorporated under one allegiance ; and it was almost as important for us that the other great branch of the English-speaking people across the Atlantic had at the same time to deal in a similar way with as many separate jurisdictional areas as there were States under the Stars and Stripes. Under pressure from influences such as these we have evolved, mainly as judge-made law, a considerable body of international doctrine. And when I say "we," I might with little impropriety take it to refer not only to English but to Anglo-American jurisprudence, so much have this country and America developed their international jurisprudence side by side. For a long time the standard treatise in English was that of the American, Judge Story, and he exercised great influence upon our courts : and that is why I referred to America in naming just now the influences which combined in this century to produce our present system, for, incomplete as it is, it now deserves the name of system.

You will understand that I cannot in the short space at my disposal tell you much about the principles of English International jurisprudence as thus developed, or about the numerous problems that have arisen in the course of the century. If I were to attempt to do so, you would find the diet of mental pemmican very indigestible and not nutritious. I prefer to limit myself to two illustrations only.

I. The general character of cases involving Private International Law is that they contain some foreign

element, and sometimes the foreign element consists wholly, or in part, in the fact that a foreigner is concerned. Take, *e.g.* the case of a marriage in England of a foreigner to an English girl of full age. Suppose the question of its validity comes before an English Court, the foreign element—and indeed the only one—is in the personality of the bridegroom. In such cases as this, many of the questions which arise are, in all civilised systems, answered by reference to what is called the Personal Law of the party. Such questions would be: Is he of age to marry? and Is he too near of kin to the bride? The foreigner is, in short, held to bring with him into the alien jurisdiction a stamp, a "character," impressed upon him by his Personal Law. Now this Personal Law may be either the law of his political allegiance (*i.e.* his nationality), or the law of his domicil (meaning by "domicil" the place where his home is, or for legal purposes is supposed to be): some systems choose one, some the other. If, for instance, an Italian tribunal were deciding upon the validity of the marriage of the foreign bridegroom just referred to, the tribunal would look, so far as the bridegroom's capacity is concerned, to the law of his nationality: an English tribunal would consider, on the other hand, that the bridegroom's Personal law was the law of his domicil. This illustrates the point which I wish in the first place to make. During this century a great split has taken place in regard of this matter. At the beginning of the century the Personal law was always the law of the domicil, and so it remains in what may be called Anglo-American jurisprudence, and, indeed, the elaboration of our doctrines concerning the nature

of Domicil has been a noticeable part of our legal development of the century. But on the Continent of Europe it is otherwise. An enormous change has taken place there during the century now closing, a change which was initiated in the Code Napoleon, and which was, in the legal area, a triumph of that sentiment of nationality which has been so active in the political area. The Italian Code of 1865, and the new German Code which came into force on the first day of this year, accepted Nationality as the general test of capacity even more frankly than the Code Napoleon ; and, to-day, Domicil is retained as the general test of the Personal Law by but a small part of Europe outside our own country. What, now, are the questions which are remitted to the decision of Personal Law ? Obviously, matters referring closely to the personality of the individual. The list varies with different jurisdictions. Questions of capacity dependent on age, or on defect of reason, or on marriage, would in all systems be left to the Personal Law—(thus French Law before 1883 held an English wife incapable of contracting to the same extent as English Law, her national law, did)—and some systems recognise also foreign incapacities based on prodigality, religious profession, etc. In general, we shall find the Personal Law determining questions of Status, Capacity, and Family Law. Then there is another large department of Law in which the Personal Law operates—Inheritance. We in this country are so accustomed to the conception of a man having full power to defeat the claims of his Family by his will—a respect in which our jurisprudence stands alone—that it requires an effort to understand why questions of Inheritance—(at any

rate so far as Testaments are concerned)—should, in many respects, be governed by the same general law as Family questions. But so it is. I cannot, however, stop now to justify that. My immediate object is, to point out that, while on the Continent the Personal Law which is applied in these cases, is more often that of the political allegiance than that of the Domicil—especially in matters of Family Law and Succession—our jurisprudence stands where it did at the beginning of the century and takes Domicil as the decisive factor. It is, *e.g.* to the Law of the Domicil that our Courts look when considering whether the parties to a marriage are old enough to contract marriage at all, and sufficiently remote in blood to marry each other. The Law of the matrimonial Domicil can alone decree a divorce which our Courts will recognise. The legitimacy of a child is, in general, held by our Courts to depend upon the Law of the father's Domicil at the time of the child's birth. The liability of property in this country to pay Legacy Duty depends, to take another example, upon the deceased's being domiciled here. The importance of Domicil in the domain of Inheritance is further shown by the fact that the Law of the deceased's Domicil regulates in general, so far as movables are concerned, the form of a will and capacity to make a will and distribution on intestacy. If, again, a person is made bankrupt in a foreign country, that will operate as a transfer of his movables in England only if he be domiciled in that foreign country. From these illustrations (the rules applicable to which have, practically all, been evolved during this century) you will gather what the importance of Domicil is in English International Jurisprudence. I have

not time, though the material is abundant, to contrast with this the operation on the Continent of the principle of Nationality: one example must suffice, and it is a striking one. Italian Law does not recognise divorce, yet in 1898 it was held in Italy that two non-Italians, if their National Law allowed and granted divorce, might come before an Italian tribunal and demand divorce on the strength of their National Law, provided that the ground of the divorce was one which that Personal Law would recognise as adequate.

II. You may have noticed in the course of the illustrations which I gave just now, how movables are in English International jurisprudence marked off for different treatment from immovables: thus I, impliedly, said that a Foreign Bankruptcy may affect movables in England but will not affect English land. This more or less rigid seclusion of land from the operation of any laws but that of the place where the land is situated is a feature of most systems. In England, however, this *reality* (as it used to be called) of the law affecting land is intense, nowhere intenser. Bearing this in mind, let us call to remembrance a matter in regard of which English Law, to its shame, differs radically from the systems founded on the Roman Law. English Law does not allow that the parents of an illegitimate child can, by subsequent intermarriage, redress the wrong which they have done to it. In Private International Law, however, England is sometimes compelled to apply the law of a system (such as the Scottish) which recognises such subsequent legitimation, and the rule which English International jurisprudence has adopted, is that in such cases it will recognise the child as legitimate,

provided that at the time both of its birth *and* of the marriage of the parents the father is domiciled in a country which admits of such legitimation. Now in the first half of this century a case arose in which this doctrine was brought into collision with the other doctrine just referred to, whereby foreign law is warned off all intrusion upon English land. The question was, whether a child so legitimated could take English land on the father's intestacy as his heir. The House of Lords said No, though Lord Brougham did not agree. The child was legitimate by the law of Scotland where he was domiciled, but the Court said, To be heir to land in England an eldest son must be more than legitimate—he must be born *ex justis nuptiis*. (*Birtwhistle* v. *Vardill*, 7 Cl. & F.) This decision has met with the derision of foreign jurists, who, exaggerating, base upon it a belief that the whole of our Private International system is tainted with the dregs of feudalism. Later cases have somewhat tempered the crudity of the decision in question : thus it has been held that such a child is within the meaning of the word "child" in a gift of land to "children." But the most curious revenge has been reserved for the last years of the century. To understand what I refer to, you must know that the proprietor of the Café Royal in Regent Street, London, died a few years ago, leaving behind him a large fortune both of lands and of goods in this country. He was French by birth and before coming to England had married a Frenchwoman in France. There was no marriage contract : and when that is so, the French Law (being the law of the matrimonial domicil) implies that the parties have selected, as regulative of their proprietary relations

*inter se*, what is known as the system of community. Some years after marriage, the husband and wife came to London, and the husband built up a large fortune. Upon his death the question arose whether the law of his new domicil, England, or the law of his domicil of origin, France, determined what was the interest of his widow in his movable property. If it were the local law of England, then the widow would only obtain what her husband had left her in his will; if, however, the contract implied at marriage by French Law were held still to be binding, despite the change of domicil, the system of community would apply and the lady would get much more. The House of Lords held that a settlement created merely by implication under the foreign law of the original matrimonial domicil was just as binding in England as an expressly executed settlement. That decision, mark, applied only to movables. The doctrine as to the sacredness and persistence of the implied marriage contract was, however, very broadly stated by the House of Lords, and, in reliance on it, the lady afterwards claimed the lands also. She alleged in effect, you see, that the law of a foreign country could operate, through the medium of an implied contract, in the close preserves of English Land Law; and, on bringing action, she succeeded. We may set this over against the decision of sixty years earlier, whereby a child legitimate all the world over was held unable to be heir to English land, and regard it as the basis of a more liberal doctrine that is to be. (*De Nicols* v. *Curlier*, 1900 A.C.)

By way of transition to Public International Law I will now call your attention to a matter which is of importance both in Public and in Private Inter-

national Law—I mean British Nationality. What a strange elusive conception is this of Nationality when one thinks of it and tries to analyse it! If only different nationalities, so far as they implied an exclusive community of descent, were painted different colours, the task of identification might be easy: but humanity is stronger than nationality; type passes into type by imperceptible gradations; and the tests of race, language, religion, tradition, yield no clear-cut divisions. Now, at the beginning of this century our country and all Europe took a rough-and-ready way of solving the difficulty. English was he—or British rather—who was born on British soil; French who was born in France. That nationality should be thus determined by the soil on which birth takes place was at one time the rule of Europe. English Statute Law, as early as Edward III., modified the general rule, and in the reign of Anne another statute (as since amended) declared that children were British who were born abroad of natural-born British fathers, a privilege since extended (subject to detailed conditions, with which I need not trouble you) to grandchildren. But the general law of England looked simply to place of birth; there was such and such a crop of Little Britons raised every year, just as there was such and such a crop of British wheat, and the nationality of the sower was as immaterial in the one case as in the other. Such is still the general rule of our law. We have not shared in that Continental movement which began with the Code Napoleon in the first decade of this century. It was felt by the framers of that code that it was illogical to make the mere accident of place of birth

the criterion of nationality. A child might be born to an alien while the mother was passing through France, and be hurried out of France at once: what tie, in logic, bound it to France? Accordingly it was enacted by the Code Napoleon that a child should follow the nationality of its parents; and that principle has since been adopted as the general rule, with local variations in matters of detail, by the more important States of the Continent. We, however, still stand in the old way so far as general rule is concerned. Those born on British soil are within the protection of, and therefore bound by allegiance to, the British crown, and are British subjects. And note particularly that at the beginning of the century this tie was permanent, this allegiance was indelible. Expatriation at the will of the party was unknown to our law. You will remember perhaps that this denial of any right of expatriation caused difficulties with the United States. During the Napoleonic war at the commencement of the century we used to impress our merchant seamen for service in the fleet, and many of them attempted to evade the liability by taking refuge on American ships, often under the guise of naturalised American subjects. If, however, in exercise of the belligerent right of Visit-and-Search we detected such acts, we removed the offenders from the American ship by force. The United States had not at that time arrived at the doctrine enunciated by Congress in 1868 that "the right of expatriation is a natural and inherent right of all people," but they naturally objected to such high-handed proceedings as I have referred to; and this was one of the causes of the unhappy war between this country and the United States in 1812.

As late as 1866 British statesmen were to be found asserting the indelibility of the allegiance, but it was felt to be a doomed doctrine, and in 1870 came that epoch-marking Act, the Naturalisation Act. By that Act it was provided that a British subject who voluntarily became naturalised in a foreign state should lose his British nationality. The delightful librettist of *H.M.S. Pinafore* eulogised, you remember, one of his characters for that "in spite of all temptations to belong to other nations he remained an Englishman." Well, I don't know what the date assigned to the play is, but if it is before 1870 the suggestion is that Mr. Gilbert, when reading for the bar, was not assiduous in his attendance on the Reader in International Law. For before 1870 it would not have been a matter for credit at all. If the poor sailor was British once, British he had willy-nilly to remain. By the Act of 1870, however, as we have seen, he acquired the power of expatriation. And not only so, but that Act modified the matter of which I was speaking just now by allowing children born on British soil to alien parents to elect to be of their nationality of parentage despite the old rule whereby birth on British soil gave British nationality, and—more important still—it allowed aliens, persons not born on British soil, to become naturalised British subjects. A certificate from the Home Secretary, granted at his discretion on the fulfilment of certain conditions, will now do what formerly—at any rate, before 1845—could not have been done except by an expensive Act of Parliament.

Public International Law develops in two chief ways, with Usage and by means of Treaties: and of course in both these modes the co-operation of

this country is implied. In the first place, like all true Customary Law, Public International Law is in the main a transcript of the usages which actually prevail in inter-state life—usages based in part on their inherent reasonableness (like the rules for settling disputed boundaries), in part on considerations of expediency (like the rules as to diplomatic immunities), and in part on the mere fact that they are usages (like, perhaps, the belligerent right of search). When International Law is thus developed by growth of usage, England has, if only by acquiescence, its share in producing the result. Thus, it is probable that the admission by Lord Salisbury in the *Bundesrath* case will lead to a general usage exempting neutral mail steamers from visit and search.

The other chief source of International Law is in the conventions of civilised states, and in their expressed consensus; illustrations of such conventions and of England's share in them will shortly be given.

In many books upon our municipal English law we have a thoroughly chacteristic mode of exposition by means of Leading Cases or what were at one time leading cases. It has the merit of saving the author much trouble with regard to the logical arrangement and proportioning of his work. Let me then, avowedly with that object, rush straight to a Leading Case or two. Our neutrality during the Civil War in North America of the early sixties shall furnish them.

In November, 1861, great excitement was caused in this country and throughout Europe by the affair of *The Trent*. The Southern Confederacy earlier in that year had sent a deputation to Europe: they did not find themselves as warmly received by the

European Courts as they had hoped: they were treated as private gentlemen and nothing more. So the Confederate Government determined in November, 1861, to try again, and this time they selected the most eminent persons they could find. While the envoys so selected were on the high seas on their journey to Europe they were taken out of the vessel by a U.S. cruiser. Now, the serious part of the matter was that the vessel out of which they were taken was a British mail steamer plying in the regular course of her trade between two neutral ports: its name was *The Trent.* In Professor Bernard's book you will read about the warning gun, the seizure and search, the ladies' shrieks, the captain's protest; there, too, you will find in full the diplomatic despatches which resulted. In the issue, after a period of painful tension the captured envoys were released by the government of the North: the ground upon which it released them was that they had been seized and carried away on a quarter-deck decision and not after the intervention of a prize court. Apart from its historical interest the case of *The Trent* has little value. The only question which it raised was whether a neutral ship forfeits its neutrality and exposes itself to condemnation, by carrying as passengers, from one neutral port to another, persons going as diplomatic agents of the enemy to a neutral country. The American government took the line that diplomatic agents, or at any rate that agents of a community not recognised as independent, when so carried are to be treated as contraband of war. The neutral flag, they admitted, protects enemy's goods, but not when these goods are contraband of war: and it was claimed that the

principle could be extended from noxious goods to noxious persons, that such persons were, in short, what has been called "analogues of contraband." The English Government asserted (and the doctrine may now be considered unchallenged law) that the principles applicable to contraband goods cannot be applied to envoys of a belligerent in course of carriage to a neutral port by a neutral vessel in the ordinary course of its trade. The matter is indeed not one of contraband at all, for there is no belligerent destination; it is simply a question whether the act complained of amounts, or not, to un-neutral service.

In the course of the war of 1894 between China and Japan an affair occurred, which was, indeed, distinct from that of *The Trent*, but sufficiently similar to it to be mentioned by way of note to our leading case. A British steamer, named *The Gaelic*, called at Yokohama in Japan, when she was on her way from the neutral American port of San Francisco to the neutral British port of Hong Kong. She carried among others a person who had been commended to Li Hung Chang by the Chinese Ambassador at Washington as the inventor of a method of accomplishing the following modest combination of objects among others: to veil the approach of torpedo boats even in day-time, to land troops at any given point unseen by the enemy, to destroy a whole fleet whether at anchor or under way, to make an ordinary ocean steamer more than a match for the most powerful battleship at a cost of, say, £60. The Japanese authorities at Yokohama naturally took a good deal of interest in the inventor, and showed it by searching *The Gaelic* for him and

his material. He, however, gave them the slip. The search, unlike that in *The Trent* case, took place in Japanese waters and was obviously justified by overriding considerations of self-preservation: had, however, it taken place on the open sea (it is interesting to note) we should have had a case very similar to that which has arisen during the present war with the Transvaal. Hong Kong was a neutral port from which a great trade was done with China, one of the belligerents: and the same questions would have arisen which have arisen in the course of the past year (Lorenzo Marques being substituted for Hong Kong and the Transvaal for China) namely, what are the rights of a belligerent with regard to persons and goods, in their nature contraband of war, which are on their way to the other belligerent *viâ* a neutral state or market? and does it matter, with regard to the goods, whether they are consigned to the belligerent direct, or will only reach him through the intervention of a genuine transaction in the neutral market? Unhappily these questions were not settled either in the Chino-Japanese or in the present war, and must be handed over to the 20th century unsolved.

Another and more important question arose between Great Britain and the United States, after the Civil War was over, in connection with certain ships of which *The Alabama* is the best known. That matter shall furnish us with our second leading case. When the war broke out, the North was very badly equipped with small arms; these were largely supplied by Europe. The South was extremely badly off for ships of war. No country had previously insisted with more energy than the United States, upon the

right of its subjects to supply articles contraband of war to belligerent powers: it was admitted of course that the individual citizen who engaged in such commerce ran the risk of his property being confiscated by the enemy if it fell into his hands, but it was denied that any responsibility attached to the State which allowed its subjects so to trade. The North, then, got its muskets at the risk of the individual trader. What about the South and its ships? In approaching this question we must remember another admitted proposition, namely, that a neutral State may not allow a hostile expedition to leave its shores, may not allow its territory to be made a hostile base, without incurring State-responsibility therefor. In the case of *The Alabama* (by which name I refer also to the other ships of similar history and kind), the question arose whether the sale of men-of-war by neutral subjects to belligerents is to be classed with the sale of small arms (in which case there was no State-responsibility alleged), or to be dealt with in the same way as the equipment of a hostile expedition (in which case the neutral State which allowed such sale would be responsible). The case illustrates in the area of International Law that difficulty of drawing exact dividing lines and of fixing definitions which is such a fertile source of profit to the practitioner in municipal Law: the damages in this case were over three million pounds, and the bill was paid by this country.

In the winter of 1861-2 officers of the Southern Confederacy were known to be in England with the object of obtaining men-of-war for the Southern States. Vessels of that kind cleared from English ports in all but complete preparation for war: their

nominal destination was Palermo or some other place in the sunny south: the South which they actually reached was not in Europe! About this time the U.S. Consul in Liverpool had his doubts about a man-of-war which was being built by Messrs. Laird at Birkenhead: it was known then as No. 290, but to history as *The Alabama*. On June 21st, the Consul wrote to the U.S. ambassador in London the first letter in a long correspondence relative to this vessel. On the 1st July the Commissioners of Customs reported that there was not enough evidence to warrant the detention of the vessel. Towards the end of the month as the vessel approached completion, it rained affidavits as to the guilty destination of the ship, and counsel of eminence advised as early as the 16th July that there had been an infringement of the Foreign Enlistment Act. At last, on the 29th July, the Law Officers reported to the Foreign Secretary their opinion that the vessel should be seized. Alas, early that very morning she had put to sea—just on a trial trip, and carrying with her, to aid the pretence, a number of visitors including ladies. The trial must have been very satisfactory, for the visitors were sent back at the mouth of the river (which shows that "slimness" was known before 1900), but the vessel herself never returned. Then, but too late, every effort was made by the British administration to catch her. When she left Liverpool she was unarmed: but off the Azores she received, from ships which had left England a little before, her armament and her officers. She then started out to harry and destroy the shipping of the North; her career, in the course of which she was several times allowed to refit and coal in British

ports, ended on the 19th June, 1864, when she was sunk off Cherbourg by the U.S. Steamer *Kearsage*. After the war was over the U.S. government claimed that this was not a case like the supply of contraband involving only the risk of the neutral subject, but a case of a hostile expedition involving State responsibility if it could be shown that the State had not used due diligence in the matter, and the U.S. intimated that they would hold this country responsible for what had occurred. Negotiations dragged on until 1871, when the matter was referred by the Treaty of Washington to the Arbitration of five persons who were to meet at Geneva. The claims—which related not only to *The Alabama* but to many other vessels of the same character—included as well as the direct claims what were known as the "indirect claims," claims, *i.e.*, for damages arising from the fact that many American traders, through fear of *The Alabama* and her wicked sisters, had transferred themselves to the British flag, from the increased rate of marine insurance, and from the longer continuance of the war, and so on. The indirect claims were dismissed at once by the arbitrators. On the direct claims this country was mulcted in 15,500,000 dollars.

The present day importance of the story is in connection with the Treaty of Washington, which preceded the arbitration. By that Treaty certain rules were laid down concerning the duty of a neutral to employ due diligence to restrain the fitting out of vessels in its territory for belligerent use; and, though Great Britain expressly refused to admit that they represented the actual state of the law in 1861, she agreed to adopt them for the purposes of the arbitration. These rules of the Treaty of Washington have not

been universally adopted, but none the less they mark a very notable era in the history of neutral duty : the supply of warships seems—and reasonably—to be differentiated by them from the supply of ordinary contraband, but the question is far from settled.

By way of notes to this leading case let me point out, first, how, after *The Alabama* dispute, the British Parliament stiffened up our municipal law on the duties of British subjects as neutrals, wisely going beyond the bare demands of International Law. The only other Act dealing with this matter was passed in 1819, and was one of the most important developments, within the century, of British doctrine with regard to International Law. That Act was primarily concerned with foreign enlistment, and was called the Foreign Enlistment Act ; in 1870 a separate part was added dealing with illegal shipbuilding and illegal expeditions. The new Act, as is so often the case with us, retains the old name, but that name is inadequate enough to be misleading.

During the course of the century the two great English-speaking peoples have amicably settled many differences besides that concerning *The Alabama;* I may mention the disputes as to the boundaries of Oregon and of Maine, and that concerning the navigation of the St. Lawrence river. A dispute with ugly possibilities was also closed in 1893 by the Behring Sea Arbitration. It is pleasing to note in connection with this matter of arbitration that while over sixty international arbitrations have taken place since the Peace of 1815, and while America takes the front place as having been a party to over thirty of them, the other great English-speaking country comes second with a record of over twenty.

This century has been notable not only for the appearance of Arbitration as a powerful agent of peace, but also for the number of general congresses which have been held for the purpose of lessening the horrors of war. To these this country has, of course, been a party. There was, first, the Geneva Convention of 1864, which declared by general consent the immunity from intentional attack of surgeons, nurses, ambulances, and military hospitals, and which established the Red Cross badge. This was followed by the Declaration of St. Petersburg of 1868 by which the European Powers (except Spain) abandoned the right to use explosive projectiles weighing less than 14 oz., declaring that the object of war was to disable and not to kill or mutilate. The Conference of Brussels of 1874 dealt with some doubts which arose during the Franco-German War, and laid down the conditions under which guerilla bands may claim combatant privileges. And there have been other such conferences, such as the recent one of The Hague. One conference, dealing mainly with the rights of neutrals, deserves, however, more than a passing mention. War is allowed to alter seriously the position of neutrals. What in peace is an innocent trade, may in war expose goods and ships to confiscation and even (in the case of blockade) neutral subjects to imprisonment; and many attempts had been made before this century, but in vain, to arrive at some general understanding with regard to the limits of the belligerent right thus to interfere with neutral freedom of action. Views of different States, practices of different States, were too diverse. Thus Great Britain and France had long been at variance with regard to the questions whether neutral goods

were capturable in an enemy's ship, and whether the neutral flag cast any protection over enemy's goods which were being carried under it. There came a time, however, in the middle of the century when Great Britain and France were to fight side by side in the Crimean War, and it became necessary for them to adopt a common principle of action with regard to these matters. Each Power made concessions, and a working arrangement was come to, which dealt with neutrals as liberally as possible: with the exception of contraband of war, (1) the neutral flag was to protect even enemy's goods and (2) neutral goods were to be safe even under an enemy's flag. After the Crimean War was over, a conference was held in Paris upon these and other matters, and the compromise just referred to was accepted as forming a general rule in regard of the two matters mentioned. Two other matters were also discussed, one of which related to what were called paper blockades—that is to say, blockades which were proclaimed, although in point of fact no efficient blockading squadron patrolled the coasts which were declared under blockade. We are still in the same century in which by a stroke of the pen we proclaimed the greater part of the coast of Europe under blockade, and in which Napoleon declared the whole of our island to be blockaded, though no French squadron dared show its nose outside a French port. The conclusion arrived at in this matter by the Conference of Paris was that blockades to be recognised must be effective. A fourth resolution of the Conference declared that privateering was abolished. The four points were embodied in the well-known Declaration of Paris of 1856. All the Great Powers of Europe were

original signatories of the document, and the other Powers have since assented to it, with certain exceptions, the most noticeable of which is the United States. The principles of the Declaration, however, have not been contested in any war which has occurred since its promulgation, not even when non-assenting States have been at war. The abstention of the United States, it should be added, was not due to any dissent from the principles of the Declaration: not possessing, and not desiring to possess, a powerful navy, the United States were unwilling to declare against privateering so long as private property at sea was held liable to capture by an enemy. They, accordingly, pressed for a prior adoption of the principle that, contraband apart, an enemy's men-of-war on the high seas were to confine their attentions to men-of-war and let the humble trader go. If that immunity were conceded to the merchantman, the United States were ready to abjure privateering and accept the whole Declaration. That immunity, however, has not been conceded: and it has not been conceded owing to the opposition of one Power only: and that Power is the Power which possesses the largest merchant fleet, and is more than any other Power dependent on sea-borne trade. Whether Great Britain is wise in adopting this attitude—as, indeed, whether it is politic for her to continue to concede to the neutral flag the privileges of the Declaration of Paris—is an open question beyond the scope of this lecture.

We came into this century at war; we do not go out of it at peace. Throughout the century great wars have occurred, each raising a crop of legal questions important to ourselves either as belligerents or as neutrals: and it must be admitted that it is in

regard of Belligerency and Neutrality that Public International Law has mainly developed—and such development is not amiss, for, while greed meets greed, there will come the tug of war. At the same time, less exciting but not less creditable progress has been made in the Law of Peace. I will, in conclusion, give an example or two of such progress, intimately connected with this country. I might mention, first, the evolution of a generally adopted code of rules for ocean navigation. Then there is the matter of the slave trade. This is not piracy *jure gentium*, though the United States, to its honour, proposed three-quarters of a century ago that it should be. Throughout the greater part of the century Great Britain has striven to procure powers for the suppression of the trade, and some of the finest exploits of our navy, though not performed under the eyes of the world, have been devoted to carrying out such powers as have been conceded. In 1890, as the result of a Conference called on the initiation of this country, a Convention was drawn up, which has since received the assent of all civilised Powers, and which attacks the evil more energetically than ever before. If at some future date the righteousness of our country is genuinely weighed in the balance, I believe that its persistent efforts to develop an International Law against the slave-trader will be not the least valuable of our moral assets. Sometimes, however, the mischief which this country has had to excise, in order to make international progress, has been internal to itself. There is room for an instructive monograph upon the jealousy towards the executive which characterises our constitution as judicially expounded. Vice-Chancellor Shadwell, indeed, once remarked :

"Sound policy requires that the Courts of the King should act in accordance with the Government of the King." But it is certain that the Courts of the King have often hampered the Government of the King. Official fear of them, as it seems to me, cost us the Alabama bill. And it was believed, at the time of the Pacific Blockade of Crete, that an English trader, if forcibly debarred of access to Crete by the captain of a British man-of-war forming part of the blockading squadron, would be able to recover damages against him in an English Court, despite the official declaration of the blockade. I am informed by high authorities in France and in Germany that in both these countries the captain would be immune. Now, this jealousy of ours towards our executive is, internationally, not seldom something of a stumbling-block: and one of the notable advances made by us in this century in the international Law of Peace has involved to a certain extent a statutory suppression of this jealousy. I refer to the development of our Law of Extradition. To illustrate what I have been saying, I may tell you of a case which happened in 1836. Some Spanish convicts were wrecked on our territory while being taken under sentence of transportation from Cuba to Spain: the Law officers of the Crown had actually to advise that the English law authorised neither the detention of these convicts in custody nor their surrender to Spain. Our Extradition Law is still defective, but in the course of the last half of the century it has gone a considerable way towards removing by statute the reproach of 1836, and towards the recognition of Extradition for non-political crime as a duty owed to the solidarity of civilisation.

JOHN PAWLEY BATE.

## IV.

# CHANGES IN THE CONSTITUTION, ETC.

(Thursday, November 29th, 1900.)

*The Franchise—Religious Disabilities—Government by Departments—Police.*

### THE FRANCHISE.

It is improbable that there are many persons now alive who have an intelligent remembrance of the state of affairs prior to the Reform Act of 1832. The great political struggles of the seventeeth century had left the House of Commons in a position of commanding influence in the Government of the country. Travelling had become easier and swifter, and London was now the centre of affairs and the centre of fashion.

The counties had always sent their knights of the shire to Parliament, but the position of the borough representation was very remarkable. Many of the boroughs had ceased at an early period, for economy's sake, to return members at all, while the Tudors created new boroughs one after another, not because they were important, but because they were unimportant, and might be trusted to return mem-

bers at the direction of the Crown. But it is to be observed that, with the exception of two boroughs created by Charles I., no new boroughs were created in the period which came between the death of James I. and the Reform Bill of 1832.

But, meantime, a change had been in progress. At the beginning of this century, not only had the population enormously increased, but it had shifted. The great awakening of science and the mechanical arts, and the consequent rise of great industries, attracted men to new centres alive with thought and action. Manchester, Birmingham, Leeds and Sheffield, Leith and Paisley, had no representatives at all, while London itself, which now stretched from Lambeth to Greenwich, had no more than in the reign of James I. At the date of our Revolution, the population was about 5,000,000; in 1831 it was about 14,000,000. The great new industries lay in the north of England; in the year before the Reform Act, viz., 1831, the ten southern counties of England and Wales, with a population of about 3¼ millions, returned 235 members to Parliament; the six northern counties, with a population of 3½ millions, returned only 66. Lancashire, with 1,330,000 people, returned 14; Cornwall, with 300,000, 44 members. In 1801 a regular census was taken, and the facts and figures became notorious. As a nation, I suppose, we are singularly tolerant of anomalies as such; we might, perhaps, say that we are not indisposed to regard them with something like affection. But these were no ordinary anomalies. They protected gross abuses, taxation was oppressive, and the administration of justice not in accord with popular opinion.

In 1793, taking a moderate computation, in England

and Wales, 309 M.P.s out of 513 were nominated by the Treasury, or by 162 powerful individuals, and returned either by decayed towns where there were no voters at all, or by little villages where a handful of electors obediently supported their patron's nominee. 245 were notoriously nominated by peers. The Duke of Newcastle, Lord Buckingham, Lord Mount Edgcombe, and Lord Eliot each returned 6 members, many had a less number, while Lord Lonsdale, as he returned 9, was known as the "premier's cat o' nine tails." A borough or so was a judicious investment for a nobleman who wished a step in the peerage. Greville, on September 8, 1831, writes: "Howe told me yesterday morning in Westminster Abbey that Lord Cleveland is to be a Duke, though it is not yet acknowledged if it be so. There has been a battle about that, they say that he got his boroughs to be made a Marquis, and got rid of them to be made a Duke."

Lord Monson's borough of Gatton was a gentleman's park, Lord Caledon's borough of Old Sarum was a green and grassy mound, Lord Huntingfield's borough of Dunwich had nestled unseen for centuries under the North Sea. There were 19 electors at Helstone who voted as the Duke of Leeds told them. At Truro, it is true, in 1818, the Regent ran a candidate against Lord Falmouth, and, after a ruinous contest, polled eleven votes against his lordship's dozen. But in most cases a borough seat was an available asset, worth about £5000 for the session of Parliament. The fortunate owner might dispose of it to his own party in return for cash, place, pension, or rank; he might, if he took a merely business view, unbiassed by party prejudice, sell it to

the highest bidder. A petition presented to the House of Commons in 1817 stated that seats were bought and sold like tickets for the opera. "Have I not the right to do what I like with my own?" asked the Duke of Newcastle with great simplicity in 1829. For in that year, one of the members for Newark, which was one of the Duke's boroughs, Sir W. Clinton, had taken the liberty to vote according to his conscience, but contrary to his Grace's wishes. He was forced to resign. The Duke nominated a new candidate, against whom Serjeant Wilde presumed to stand. The Serjeant polled 587 votes, but lost. All of those 587 who held land under the Duke received notice to quit. In answer to a remonstrance, the ducal answer was what I have told you.

If a constituency was not notoriously in somebody's pocket, it was notoriously corrupt; there was no third class. Greville, on December 2, 1830, says "the Liverpool election, which is just over, was a remarkable contest. It is said to have cost near £100,000 to the two parties, and to have been a scene of bribery and corruption perfectly unparalleled: no concealment or semblance of decency was observed, the price of tallies and votes rose like stock as the demand increased, and single votes fetched from £15 to £100 a-piece.

"The voters got a receipt for their votes, took them to the committee, handed them in through one hole in the wall, and the money was handed out through another; and this scene of iniquity—when the cry for reform is echoed from one end of the country to the other, and in the case of a man (Denison) who stood on the principle of reform.

Here comes the difficulty of reform, for how is it possible to reform the electors?"

It will not surprise you that a man who had laid out so great a capital sum should look for a commensurate return. It was not an extravagant hope. Places, pensions, and sinecures were to be had, with the assistance of luck or influence, or effrontery. Considerations of an applicant's fitness for a post do not appear to have had undue preponderance. In a Return made by the Government in 1830 it appeared that a right honourable lady, a baroness, was Sweeper in the Mall in the Park, another lady was chief usher in the Court of Exchequer. There were four patentees of the sinecure place of *Custos brevium*: one was a woman, the second a Catholic, the third an infant, the fourth a lunatic. These were, no doubt, very small fry; a place which a self-respecting man might accept was worth some thousands. Greville himself, the grandson of a son-in-law of a Duke, in addition to his official salary of £2000 as Clerk of the Council, which he, perhaps, earned, received £3000 as Secretary to the Government of Jamaica, on which island, we need hardly say, he never set foot. Lord Seaforth was made Governor of Barbadoes. It was his misfortune, not his fault, that he was both deaf and dumb. In fact, the Government of this country was managed by noblemen for noblemen; the public offices were their preserves, their families had to be provided for. It would very much have surprised them if it had been suggested that there was any impropriety in the system. Lord Ellenborough, the great Lord Chief Justice, had a son whom he had made chief clerk in his own court: a post with no

duties except that of drawing £10,000 a-year. On a motion—I scarce can name the profane thing—to reduce his son's salary, the Lord Chief Justice of England gravely said: "Reduction of salary must proceed on the ground of deminution in duty. Now, as nothing has ever been done in the Clerkship of the Court of the King's Bench, it is impossible that less could be done in it in future." And this reasoning was considered, and rightly so, to be irrefutable.

The county representation was of the same character; the nominees of the great landowners were returned in many counties as a matter of course. In some, such a thing as a contested election was unknown. In 1831 a Return stated that no poll-books existed in Denbighshire, that there had been no contest for a hundred years in Cheshire or Notts, or for twenty in nine other counties.

In case any one here should come from north of the Tweed, I hasten to say that the condition of Scotland was no better. The county of Bute had a population of 14,000, and twenty-one electors, of whom one resided in the county. "At an election at Bute," said the Lord Advocate, in 1831, "not beyond the memory of man, only one person attended the meeting except the sheriff and the returning officer. He, of course, took the chair, called over the roll, answered to his own name, moved and seconded his own nomination, put the question to the vote, and was unanimously elected."

In the English counties the franchise was uniform, only the 40s. freeholder had a vote. Now, though this sounds a fairly liberal franchise, it is highly probable that the very small freeholders were few,

and that the voting power really lay in the hands of the county gentlemen and nobility, or what we call the landed interest. The copyholder and leaseholder had no vote. In the boroughs, on the other hand, the franchise was in the most confused state, so various and difficult were the qualifications that rapid polling was an impossibility. In 1807, the polling clerk at Horsham had to take down the description of every burgage tenement from the deeds of the voters. There were only 73 voters polled, but the examination of titles kept the poll open for two days. In the famous Westminster election of 1784, the poll was open for six weeks. That was considered excessive, and by 25 Geo. III. c. 84 the polling was limited to 15 days.

You have now before you, I hope without superfluous and embarrassing detail, a sketch of the condition of things before the Reform Act. That Act swept away the complicated borough franchises, and saving freemen's and freeholders' rights, confined the franchise to the £10 householder. The county franchise was enlarged by letting in the copyholder, the leaseholder, and the tenant of the clear yearly value of £50. Fifty-six boroughs, represented by 111 members, were entirely disfranchished, and 31 lost half their representation; 46 new boroughs and 61 new county members appeared.

The effect of the Reform Act was a great and immediate displacement of the centre of political gravity. The aristocracy lost at a blow their political power, and for forty years England was practically governed by the middle classes, or by the plutocracy. The great majority of the House was to consist of borough members, and they were elected by the £10 house-holders.

The voters now had something they were able and willing to sell, there was no lack of rich men who were willing to buy, and the elector brought his wares to an excellent market.

Of the subsequent statutes, ending with the Act of 1884, it is not necessary now to speak in detail. Modern political life dates from 1832, and subsequent legislation in putting the franchise on nearly the broadest base has only developed the policy of the first Reform statute. The Act of 1884 to a great extent assimilated the county and borough franchise, in both the £10 occupier of lands or houses, and the £10 unfurnished lodger bulk very large.

It is not improbable that a further simplification may some day be made. The attractive cry of "One man one vote," at one time seemed likely to have a vogue, till some acute person tied on to it an alliterative rider of even greater charm—"One vote one value." Here, if we may hazard a speculation, lie the germs of future development: the 1885 Redistribution Act made an effort to approach a system of equal electoral areas, by taking as a rough basis that one member should represent 54,000 inhabitants: but there can be no suggestion that this principle is strictly adhered to.

It is quite possible that a further movement may be made in this direction, and it would be interesting if one of the results of the last general election were that the Conservative party became reconciled to the notion of equal electoral areas. It is, however, anything but a simple matter, rivalling in difficulty the problem of the proper representation of minorities, which we have tried to answer in the past by the creation of three-cornered constituencies, and for

which Mr. Leonard Courtney once framed a scheme of Proportional Representation, which proved enough to confound the most hardy and powerful thinkers.

It is worth observing that a great change has come over public opinion with regard to the exercise of the franchise. A vote is now regarded not as a chattel to be sold, but as a trust to be exercised: and this feeling has placed three important statutes on the statute book. The voter is to be encouraged to freely vote according to his conscience; he is therefore protected by the Ballot Act of 1872, which, incredible as it may seem, has to be renewed annually. The voter is not to be corrupted, his free and conscientious choice is not to be attacked by treating, by violence, threats, abduction, or fraudulent device or contrivance (Corrupt Practices Act, 1883), and by a supplementary statute of 1895 c. 40, the mean and discreditable artifice of lying about the personal character or conduct of the opposing candidate is made an illegal practice. There are no doubt limits to the operation of this Act of Parliament, the last election gave evidence of that, and those of you who have read Mr. Anthony Hope's last book will remember an adroit manoeuvre which could not have been hit by the statute; still shabby people dislike publicity, and the prospect of explaining to a gratified tribunal that they have not made a false statement of fact within the meaning of the Act may not prove attractive.

## RELIGIOUS DISABILITIES.

In 1829 a deplorable and embittered controversy was at last composed by an Act which admitted Roman Catholics, on taking a form of oath unobjectionable to

them, to both Houses of Parliament, to all corporate offices, to all judicial offices excepting those in the ecclesiastical court, and to all civil and political offices except those of Regent, Lord Chancellor in England and Ireland,[1] and Lord Lieutenant of Ireland. This relief was but ungraciously given, for it was extorted by the fear of civil war. The year before, two old Acts of Parliament, the Corporation Act, 1661, and the Test Act, 1673, had been repealed, but this was, in part at any rate, in favour of the Dissenters.

Though after the Reformation everybody agreed in professing the Christian religion, the Roman Catholics thought the Reformation had gone much too far, while the extreme Protestants did not think it had gone half far enough. The Government sternly imposed uniformity, its severity provoked conspiracy, and nonconformity was treated as a crime. Notwithstanding this, the Puritans at first gave a general support to the Government, for though they disliked the English liturgy, they hated and feared Rome far more, and Spain, the great Roman Catholic country, menaced our shores; but when the danger was over and the Stuarts came here and proclaimed the divine right of kings and bishops, and Charles showed an intention to indulge the Roman Catholics, the Puritans were forced into the Opposition, and became the backbone of the Revolutionary party.

The Commonwealth gave the upper hand to the Puritans, and if they failed to extract every advantage from their ascendency, it was only because Cromwell stood between them and their end. Cromwell personally favoured toleration, that toleration which a

[1] The Irish Chancellorship was thrown open in 1867 by 30 and 31 Vict. c. 75.

Presbyterian minister denounced as "'the grand design of the devil' . . . all the devils in hell and their instruments being at work to promote it." But still the Puritans, whose ideals were drawn from the Old Testament, to whom the treatment of Agag was a shining example, a precedent of almost universal application, had ploughed deeply, and when the Restoration came they could expect little consideration. They were dissenters and rebels. The Church was purged of them, and 2000 of the clergy were driven out. But Parliament did not stop here. The strength of the Puritans was supposed to lie in the towns, and measures were straightway taken to regulate the Corporations. By the Corporations Act[1] none could be elected to a corporate office who had not received the Sacrament according to the forms of the Church of England within the year. Charles in vain resisted, not because he cared for the Dissenters, but because he leaned towards the Roman Catholics, who, he saw, were equally affected by the Act. I say nothing of the other grievous oppressions of the Nonconformists, as, *e.g.* the Five-Mile Act[2] and the Conventicle Act.[3]

Towards the end of the reign the nation fell into a terror of Romanist intrigue; and in 1673 Parliament passed the famous Test Act,[4] which provided that all persons holding any office or place of trust, civil or military, should publicly receive the Sacrament according to the rites of the Church of England, take the Oath of Supremacy and subscribe a declaration against Transubstantiation, while five years later, by a Parliamentary Test Act, it was provided that

[1] 13 Car. II. st. 2, c. 1.
[2] 17 Car. II. c. 2.
[3] 16 Car. II. c. 4.
[4] 25 Car. II. c. 2.

no peer or member of the House of Commons should sit or vote without taking the Oath of Allegiance and Supremacy and making a declaration against Transubstantiation, the adoration of the Virgin, and the sacrifice of the Mass.

The Nonconformists, as on a former occasion, supported the Government in passing the Test Act, though they themselves were prejudicially affected by it, from fear of the spread of Roman doctrine.

In the next reign the malignant folly of James II. drove all Protestants to desperation, and again the Nonconformists made common cause with the Church and drove the King from the country. These eminent services entitled the Dissenters to their reward, and in the first year of William and Mary the Toleration Act became law. It did not repeal the laws of which the Dissenters complained, but merely provided that they should not be construed to extend to any person who should testify his loyalty by taking the Oaths of Allegiance and Supremacy and his Protestantism by subscribing the doctrine against Transubstantiation; but no toleration was shown to the Roman Catholics or Unitarians, for they were hated alike by Church and Dissenters.

In 1700 the real views of Parliament about the Roman Catholics were seen. An Act of Parliament offered a reward of £100 for the discovery of any Roman Catholic priest performing the offices of his Church; it incapacitated every Roman Catholic from inheriting and purchasing land, unless he abjured his religion on oath; if he refused, it vested his property during his life in his next-of-kin, being a Protestant; and he was prohibited from sending his children abroad to be educated in his own faith.

Harsh as this treatment was, it was kindness as compared to that meted out to their co-religionists in Ireland. Of that, however, I say nothing here. But the Dissenters, if we except a period of retrograde legislation during the reign of Queen Anne, had, comparatively speaking, little to complain of. They were frequently admitted to office, though they had omitted to satisfy the Test Act, and from the beginning of George II.'s reign annual indemnity Acts were passed by which 'good men were forgiven for having done good service to their country.' This principle was observed down to 1828. Parliament was willing to give indemnity for breaches of the law, yet declined to make those alterations which would make such breaches unnecessary.

Now let us for a moment see how the fortunes of the Roman Catholics were standing. It was not till 1778 that the penalties of 1700 were repealed; once more the Roman Catholic priest could perform the services of his church without fear of punishment; once more the Roman Catholic layman was allowed to inherit or purchase real estate. This small measure of relief applied to England only. A rumour that it was to be extended to Scotland threw the country into confusion. The Lord George Gordon riots broke out, London was fired, the streets ran with blood, while the Ministry sat wringing its hands. The riot was at last suppressed, but the Scottish Roman Catholic had to wait 15 years for his share of justice.

The position then at the beginning of the century was this. After great tribulation the Roman Catholic was at last relieved of the disabilities affecting his property and the exercise of his religion. But an

Act of William[1] still prevented him from voting for members of Parliament. The Act of Charles II.[2] made it impossible for him to sit in either House, while the Test Act[3] debarred him from holding any office.

Now it is quite easy for us to breathe the noblest sentiments on the subject of religious toleration. When one is indifferent one can make some very judicious philosophic reflections. Unfortunately at the beginning of the 18th century it was almost humanly impossible to be indifferent. Religion had taken sides in politics, and the Roman Catholics had become associated with the wrong side. It was their singular and lamentable case that they had no friends. The Tories hated them as Papists; the Whigs feared them as Jacobites. But when George III. came to the throne the political terror had faded away, for the Jacobites were no more. Nor was this all. Another potent force was coming into the field. The end of the century was darkened by that quarrel which ended in the loss of our American colonies. All the available troops were hurried across the Atlantic, and those that remained were barely sufficient to protect this country, while the French and Spanish fleets threatened a descent on Ireland. The Government enrolled, armed, and organised 100,000 Irish volunteers. The voice of Grattan, backed by these 100,000 arguments, extorted from fear what security had denied—free trade and a free Parliament. The majority of Irish were Roman Catholics. When the new century broke, the Irish Roman Catholic enjoyed a freedom unknown before. He

[1] 7 and 8 Will. III. c. 27. [2] 30 Car. II. st. 2.
[3] 25 Car. II. c. 2.

could buy, sell, devise, or inherit land; he could act as a guardian or a tutor; he could keep a horse worth more than £5; he could reside in Limerick or Galway; he could go to the Bar; he could marry a Protestant; disabilities, penalties, and incapacities were swept away; he could vote for Parliament, and could hold civil and military offices under the Crown. He could not indeed sit in Parliament, and the highest offices were still shut against him.

The beginning of the century thus presented some very odd contrasts; after Pitt's Act of Union with Ireland in 1800, a Roman Catholic in that country could rise to any rank in the army except that of a General, while in Great Britain every rank was absolutely shut. In Ireland he could be a J.P., but not here; in Ireland he could vote in a Parliamentary election, but not here; in Ireland he could serve on a corporation, but not here; the Irish Roman Catholic could go to any University except Trinity College, Dublin; his English co-religionist found the University doors shut in his face.

Ireland had no fleet, and the Royal Navy was therefore in the fortunate position of having its orthodoxy uncorrupted by the presence of a single Roman Catholic midshipman.

These anomalies were gross and patent. There might be something to be said for refusing a commission to all Roman Catholics, it was impossible to maintain that it was right to give a Roman Catholic a commission in Ireland, and wrong to give it to him in England.

The situation was, however, affected by another circumstance: the Act of Union with Ireland had

been carried with difficulty, and by the support of Irish Roman Catholics, which had been obtained on the understanding that the Government would afford them complete relief against their remaining disabilites. When the time came to pay the price, the Government found that it was unable to redeem its promises. George III.'s mind was threatened with collapse. He got into his head that he could not assent to such a measure without violating his Coronation Oath; it was understood that the matter must not be mentioned again during his life, and the question was hung up for a quarter of a century.

From 1812 to 1828 persistent efforts were made to relieve the Roman Catholics, but without success; if a measure passed the House of Commons it never survived the House of Lords. But this situation could not be indefinitely prolonged. Ireland had been in a most unsatisfactory state for long, agrarian distress, the tithe question, and the animosity between Orangemen and Ribbonmen, had brought it about that the island was in a perpetual state of insurrection, with which the Government as usual was unable to cope. O'Connell had appeared, he was hailed as the great deliverer by the Roman Catholics of Ireland, and in the Clare election he himself, though ineligible, was triumphantly returned over the head of Vesey Fitzgerald, who had been appointed President of the Board of Trade. Now, Vesey Fitzgerald was a man, personally popular, who had consistently voted for the relief of the Roman Catholics. Here was the writing on the wall. As Peel said, "the landlord had been disarmed by the priest." In a short time Ireland was arrayed in two armed camps, waiting for the sign to engage, the Roman Catholic Associations on

the one side, the Brunswick Clubs on the other. O'Connell took the opportunity to give a more signal proof of his authority. He had raised the storm; with an unexpected word he allayed it. He asked the people to discontinue their meetings, and the nation obeyed. The Ministry was converted, the Peers and the King submitted, and on the 13th April, 1829, the Relief Bill was passed: the battle was won, and the remaining penal enactments which cumbered the statute book were swept away in 1844 and 1846.

The Dissenters had gained relief before the Roman Catholics. They had been quite content, though nominally unable to hold offices under the Crown, to infringe the law by holding them, and be whitewashed afterwards by an Act of Indemnity. Rather than give a chance of relief to the Roman Catholics they preferred to remain as they were. But in 1827, a Mr. Smith, M.P. for Norwich, a Dissenter, on the introduction of the annual Indemnity Act, pointed out the unnecessary harshness of the law, which compelled him, if he took the smallest office under the Crown, to violate his conscience. The Test and Corporation Acts were thereupon repealed, the Dissenters only being required to declare that they would not try to "injure or subvert the Protestant Church, upon the true faith of a Christian." These last seven words were introduced by the Peers, who thus made it impossible for a Jew to make the declaration.

In 1833, Quakers, Moravians, and Separatists, who objected to taking an oath in any form, were permitted by statute to substitute an affirmation for the oath required on taking a seat in the House.

This legislation had, however, taken no account of

those persons who had no religious belief at all to make an oath binding on them, and to this omission we owe that cluster of cases which is inseparable from the name of the late Mr. Bradlaugh. He had stated that he had no religious belief, and in 1880 claimed to affirm, and the Law Courts decided that he was not entitled to do so.[1] He then said that he was willing to take the oath, and the House declined to allow him to do that; then on one memorable day Mr. Bradlaugh walked up to the table, and producing a small Bible out of his pocket proceeded to swear himself, before any one knew what was going on, and then voted in a division; in an action which was then brought at the suit of the Crown for the penalty, the Court of Appeal[2] held that Mr. Bradlaugh's method did not satisfy the Act, and moreover, that his want of religious belief, if proved, made it impossible for him to satisfy the Act even if he had been sworn in the proper manner.

In the new Parliament of 1886 Mr. Bradlaugh took the oath at his own risk, and no further proceedings were taken against him, and a painful episode was closed by the Oaths Act, 1888, which provided that whenever an oath is required by law an affirmation may be made if the person who should be sworn objects to swearing, either because taking an oath offends his religious belief or because he has no religious belief to offend.

And now to mention the religious disabilities of the Jews. The cruel persecutions of the Jews belong to an earlier epoch, but in 1830 they suffered merely from the disabilities from which Christians had been

[1] *Clarke* v. *Bradlaugh*, 7 Q.B.D. 38, affirmed on appeal.
[2] *A.-G.* v. *Bradlaugh*, 14 Q.B.D. 667.

just set free. The Jew could not take the oath of allegiance, for it had to be sworn on the Gospels, nor could he take the oath of abjuration, for that contained the words "on the true faith of a Christian"; and when the Corporation and Test Acts were repealed, and the Dissenters were set free, by the substitution of a new declaration, the House of Lords unluckily added to it the fatal words "on the true faith of a Christian." The position of the Jew had really been made worse; for formerly, in company with other Dissenters, he had been admitted to corporate offices under cover of the annual Indemnity Acts, but now no more Indemnity Acts were forthcoming. "The Jew could not hold any office, civil, military, or corporate, he could not follow the profession of the law, as barrister or attorney or attorney's clerk, he could not be a schoolmaster or usher in a school. He could not sit in either House of Parliament, nor vote at an election if called upon to take the elector's oath."

In 1830 an effort was made to remove these disabilities by Mr. Robert Grant, who was supported in a maiden speech by Mr. Macaulay. But the House of Commons threw out the Bill by a majority of 63. Some of the arguments used against the Jews read curiously nowadays. They were so rich, it was said, that they would buy seats in Parliament. A good reason one would think for reforming Parliament, and in any case an argument for disqualifying all rich men, Jews or Gentiles. It was argued—and this argument appeared first in *The Times* newspaper—that the Scriptures declare that the Jews are to be restored to their own country, that England was not their home, but merely the place of their sojourn, and so they

could not be patriotic. It was in vain pointed out that the number of Jews in this country was small, some 30,000, and that they were harmless in their relation to the State, and that in fact the Jews were not excluded from political power, and could not be, while they were permitted to accumulate large fortunes. Civil privileges are political power. "That a Jew," said Lord Macaulay, "should be a Privy Councillor to a Christian King would be an eternal disgrace to the nation. But the Jew may govern the money market, and the money market may govern the world. A congress of Sovereigns may be forced to summon the Jew to their assistance. The scrawl of a Jew on the back of a piece of paper may be worth more than the royal word of three kings or the national faith of three new American republics. But that he should put Right Honourable before his name would be the most frightful of national calamities." In 1839 they were allowed to swear on the Old Testament.

In 1845 the Jews were admitted to Corporations, and Parliament alone was closed to them. In 1847 the City of London returned as one of its members Baron Lionel Nathan de Rothschild. Then the extraordinary spectacle was to be seen of the representative of the greatest constituency in the kingdom sitting below the bar of the House, a looker-on, a stranger to its debates, from which he was excluded by his inability to say the words "on the true faith of a Christian." This discreditable state of affairs lasted 13 years, the House of Lords, year after year, throwing out the Relief Bill.

At last, in 1858, the Lords were persuaded to assent to either House being allowed, by resolution,

to omit the fatal words—the Commons could thus admit a Jewish member, the Lords could exclude a Jewish peer. The Commons accepted this half loaf under protest. It was not till 1866 that the words were finally omitted from the statutory form required.

The relief came slowly, but it came at last, and we may reflect perhaps with satisfaction that, in this country, at any rate, the Jew enjoys, equally with the Christian, assurance for his life, his property, and his good name. But it is also wholesome for us to remember that we have only recently adopted the great principle of religious toleration laid down, very simply, by Oliver Cromwell, when he wrote:

"Sir,—The State, in choosing men to serve it, takes no notice of their opinions; if they be willing faithfully to serve it, that satisfies. Take heed of being sharp or too easily sharpened by others against those to whom you can object little but that they square not with you in every opinion concerning matters of religion."

## GOVERNMENT BY DEPARTMENTS.

The next topic to which I desire to draw your attention, is the vastly increased, and probably increasing, power of the Central Government as exercised by the Departments of Government. I do not mean by this legislative activity so much as administrative interference. There was a time when the statute book was filled with enactments, sumptuary, and ceremonial, with laws directing religious, moral, and social observances of all kinds, while there was little or nothing providing for that

organised supervision to which we now attach the word "government."

The State, while imposing all sorts of commercial restriction on its subjects, had nothing corresponding to a Board of Trade, nor, while extremely busy about their orthodoxy or heterodoxy, had it anything like a department of education. The perception of the truth that much social work could be far better done by private effort than by the best intentioned Government led to the belief that not merely much but all could be best left to private enterprise. This was the view of the *laissez-faire* school of which Mr. Herbert Spencer is the greatest living exponent. He, as some of you may remember, laid down that the only true functions of Government or the State were the maintenance of order at home and security abroad. As has been well observed, the doctrine of *laissez-faire* was a doctrine drawn from political economy, pressed into the service of politics. It unfortunately has become clear that the motives which make men careful of health, studious of their morals, or zealous for the improvement of their minds, are motives which cannot in the majority of men be trusted to hold their own against the simple desire of money-getting, "auri sacra fames," and that, unless the State assists and backs the higher impulses, these impulses will on the national scale be crowded out. To those who thought this result unsatisfactory or lamentable, the old statutes, with their *bruta fulmina*, were proof that it was not enough for the State to order things to be done, but it must also see that people did them. This does not necessarily mean great centralisation; on the contrary, the duty of taking the initiative is largely left to local authorities, but the ultimate

compulsory authority is in London. We have accepted the principle that the physical well-being, the moral and mental training of the community are matters specially in the care of the State. So in education, though the making of provision for instruction is left to be dealt with locally, the quality of such instruction is tested by the central executive. The same observation applies to the topic of public health. Not only does the Government interfere to protect those who may be assumed unable to protect themselves, such as children, against parents or employers, as by the Factories and Workshops Acts, but it is being continually pressed to protect adults who are in theory able to protect themselves, but who, because they do not do so, are taken to be incapable. You may take as instances of legislation in this direction the various Mines Regulations Acts and the Unseaworthy Ships Act, each of which has called for a new regiment of inspectors.

The supervision of the Central Government over the local authority is mainly exercised through three great departments: the Board of Trade, the Board of Agriculture, and the Local Government Board.

Oliver Cromwell appointed a Commission to consider how the traffic and navigation of the Commonwealth might be promoted; but apparently nothing came of it. The Dutch, who had taken alarm at this activity, regained their composure, and the Dutch minister in London wrote to his Government: "A committee of trade was sometime since erected in London, which we then feared would be very prejudicial to our State, but we are glad to see that it is only nominal, so that we hope in time those

in London will forget that ever they were merchants." That hope does not seem to have been fulfilled.

Charles II., however, in 1660, by two Commissions, established two Councils, one for trade and one for foreign plantations, and these were afterwards united in one Board of Trade and Plantations. This Board was abolished in pursuance of a motion made by Mr. Burke in 1780, when he described it as "a sort of gently ripening hothouse, where eight members of Parliament receive salaries of £1000 a year in order to mature at a proper season a claim for £2000."

The affairs of trade were then managed by an informal Committee of the Privy Council. But in 1786, the Committee of Council for Trade was erected, which, though an offshoot, has separated from the Privy Council, and come to be called the Board of Trade, though this name was not officially recognised till 1862. On this body very large administrative powers have been gradually conferred. It has a president, a parliamentary secretary, and a permanent staff. Its business at first was to consider commercial treaties, colonial acts affecting trade, export and import duties, and restrictions affecting the trade of the country. But during this century we have seen the rise of free trade, an enormous industrial expansion, especially in railways and shipping, and the birth of the joint-stock company. All this has led to legislation, throwing heavy duties of administration and supervision on the Board of Trade.

The Board consists, I believe, of five departments. 1. The Commercial and Statistical Department. 2. The Railway Department. 3. The Marine Department. 4. The Harbour Department. 5. The Financial Department.

1. The Commercial and Statistical gives advice on commercial matters to other departments when they think fit to ask it. Its statistical side was created in 1832, and prepares statistics about the United Kingdom, colonies, and foreign countries, and about railways, agriculture, cotton, and emigration.

2. The Railway Department, instituted 1840, inspects railways before they are opened, and inquires into accidents after they occur. It reports on rates and level crossings, and keeps an eye on tramways and metropolitan gas.

3. The Marine Department (1850) has duties specially connected with merchant shipping, it supervises the compulsory examination of masters and mates, and the engagement or dismissal of seamen, their health, discipline, and proper treatment, and the condition and equipment of the ships.

4. The Harbour Department looks after the lighthouses, pilotage, and harbours, also the fisheries belonging to the Crown, also, oddly enough, it tests the weights and measures used in trade and science: it provides the standard for the Mint and Assay Office, maintains the standard of gas, and tests the apparatus which determines the flash-point of petroleum.

5. The Financial Department not only deals with the accounts of the Board of Trade, but those of funds founded for the benefit of seamen and their families, and examines those of life assurance companies.

In 1889 the Board of Agriculture was created, and took over a variety of functions formerly exercised by Commissioners of various sorts, and has besides new statutory duties since imposed. The Land Commission with its last breath handed over a great

mass of business connected with Tithe, Copyhold, Enclosures, and Drainage; the Privy Council retired from the battle it had hitherto waged against the Colorado Beetle and other Destructive Insects, and Contagiously Diseased Animals; the Commissioners of Works handed over the Ordnance Survey. The statute of 1889 gave it the power, "multis ille bonis flebilis," to muzzle dogs and to variously dispose of vagrant dogs, and those neither muzzled nor led. An Oxford College, "ut majora canamus," cannot dispose of an acre of land without the Board's approval of the price to be paid.

The Local Government Board was set up by statute in 1871, with the intention of getting a central authority which should put on a properly organised basis the duties inefficiently and uncertainly performed by the Poor Law Board, the Home Office, the Privy Council, and the Board of Trade. The subjects were, in the main, the Poor Law and Public Health.

The Act was passed on the report of the Royal Sanitary Commission appointed in 1869, which observed on the absence of a real motive power, and on the number of persons interested in offending against sanitation amongst those who must necessarily constitute the local authorities.

The Act gave large powers, and subsequent statutes have immensely increased the duties of the Local Government Board. I give you a few of the topics with which the Board deals. The poor law, vaccination, and the prevention of disease, public health, drainage, baths, washhouses, artisans' dwellings, local government, local returns, and local taxation.

It has great legislative powers, as its orders have in

many cases the force of a statute. It can make regulations under the Diseases Prevention Act (1855-1873), it has made them under the Canal Boats Acts (1877-1884) respecting the accommodation and sanitation provided for those who live on board. It revises bye-laws made by local authorities under the Public Health Act, 1875, and its confirmation is required for bye-laws as to markets, slaughter-houses, etc., in the Metropolis, hackney carriages and public bathing.

This supervision is not unnecessary, as one Sanitary Authority passed bye-laws prohibiting singing hymns in the streets, or "lounging" on a Sunday afternoon.

Every local authority can ask the advice of the Local Government Board when it is in a difficulty. If an epidemic breaks out the Board can hold an inquiry, and charge the expenses on the local rates. It reports specially on private bills relating to local matters. It constantly devours and digests piles of returns, from every local authority that has the power to rate, tax, or toll, and every year reports to Parliament its activity under its innumerable statutes.

The administrative control of the Board varies. Boroughs are outside its jurisdiction except when they want to borrow money. The Local Government Board then imposes conditions. But a District Council can be forced to carry out needful sanitary measures. In the domain of poor law the Board has absolute control. It attends to the Prevention of Pollution of Rivers. If a local authority authorises a "hooter" there is an appeal to the Board, who can revoke the sanction. It supplies medical practitioners with calf lymph for vaccination, and may take stringent measures in case of an outbreak of disease.

It sees that the Adulteration Acts are carried out, and can compel local authorities to appoint analysts —a thing many were exceedingly loth to do. This was useful activity. For in 1897 of the samples of milk analysed 10 per cent. were condemned. The analyst for Woolwich a few years back remarked in the 11th Report of the Local Government Board "that the inhabitants must be paying some thousand pounds a year under the name of milkmen's bills, but really as an additional water rate," while the analyst for Essex complained that the adulteration was not even with pure water, but that the mixture was "eminently favourable for the development of disease germs."

The Board controls the financial activities of local bodies, because as a rule no local authority can borrow money without the sanction of the Board; for example, for such purposes as paving and widening streets, providing public baths, gas-works, hospitals, pleasure grounds, slaughter-houses, and cemeteries, the need must be proved and the estimates strictly scrutinised.

Next, the Board subjects the accounts of most local authorities to a rigorous audit. The District Auditors' Act, 1879, divided the country into 33 districts, not including the Metropolis; and district auditors appointed by the Board audit the accounts of every Board of Guardians, County, District, and Parish Council, Parish Meeting, School, and Highway Board, and those of the overseers of the poor and surveyors of highways. A few curious cases came to light. In one place a Farmers' Sparrow Shooting Club had been for 25 years supported by the highway rate; in another the mole-catcher's bills were paid from the

same source—"having no other available source we paid it from the surveyor's account"; elsewhere rewards for killing foxes were paid from the rates, while the auditors disallowed money expended on champagne and plovers' eggs, seats at the theatre, travelling expenses when no travelling was done, and the cost of "suitable presentations" on the occasion of the chairman's wedding day.

I hasten to acknowledge my indebtedness to my learned colleague Mr. Blake Odgers[1] for the foregoing facts. I have the more exquisite pleasure in telling these amusing anecdotes, because I feel convinced that he intended to tell them himself next week.

Before quitting this head I should like to draw your attention to one aspect of Departmental Government in this country. It seems to become increasingly difficult for Parliament to exercise any sustained effective supervision over the Departments. This, if I am right, is due to the vast increase in the bulk and complexity of Departmental business. You may, if you please, add to this that the natural instinct of a Department is to give no information, and that by long practice the evasion of responsibility has been raised to the position of a fine art. Nor is this all; it has been observed in various quarters that the constitutional relations between the Prime Minister and and the Departments are changing. This is doubtless due in a great measure to the same cause; not even Sir Robert Peel, "the model," as Lord Rosebery calls him, "of all Prime Ministers," could now know all the details of all the Departments; though we may be allowed to doubt whether if two of his departments

[1] Cf. *Odgers on Local Government* (Macmillan & Co.), pp. 246-257.

had been at cross purposes he would have laid the blame on "the Constitution."

## POLICE.

I said a little while back that in the *laissez faire* or most moderate view of what Government functions are, the State should provide for order at home, and security abroad—that is, that it must see that the Military and Naval forces and the Police are efficient. On the first head, mercifully, I may be silent.

At the beginning of the century a gentleman who walked abroad in London usually carried arms for his protection. And though it would seem unnatural to us, if there were not a large organised body of policemen to whom to resort in cases of doubt or difficulty, whose business it is to maintain order and bring offenders to justice, we may remember that not till 1856 was there any general law for the whole of England that there should be paid policemen, and that up to 1829 there was no police force in our sense of the words at all.

The general law was that every township should have its constable, every man of the township being liable to serve his turn. He might be elected by his neighbours or appointed by the justices, and he could provide a substitute. His main duty was to arrest offenders. But as one person might possibly find his unaided powers unequal to such a task, Local Acts provided supplementary assistance in the shape of watchmen.

An Act of 1831, c. 41, provided a machinery for compelling men to serve as special constables where extra help was required. And to decline this respon-

sibility exposed, and still exposes the appointed individual to £5 fine.

In London there was no adequate protection to person or property. The suburbs were supposed to be guarded by a horse patrol, 54 men in all, the Metropolis by a foot patrol of 100 men. Besides these, in the day-time there were the parish constables, at night the watch. The watch was not a force on which you could depend in an emergency. Each watchman was appointed by his parish for the parish, and outside the bounds of his parish he would not step whatever the provocation. A felony might be committed under his eyes five yards from the boundary; it was none of his business. He was only required to move out of his box twice in every hour, and his beat could be covered in 10 minutes. No pains were taken to get efficient men, and motives of humanity kept them in their situations long after old age had made them incapable of action or perception. It was only necessary to upset the box with the sleepy old man inside and hold it down, for the place to be at your mercy.

It is true that, in addition to the night watch, the parish regularly elected a constable or head borough. The office, though hardly paid at all, was eagerly sought, from the opportunities it offered of picking up perquisites or levying blackmail. If the offender could pay, the offence could be compounded, if not, the head borough got his expenses by prosecuting him at the Old Bailey, and these ran from 28s. to 36s. per diem on each case. If one head borough brought a charge, and another came as a witness, both got their expenses, and here was a fine occasion for reciprocal courtesies.

But this was not all. Various statutes commencing with the reign of William and Mary directed rewards varying from £10 to £40, to be paid after conviction for the apprehension of highwaymen, coiners, burglars, sheep-stealers, and convicts at large, and in 1815 £18,000 was so paid.

In addition an old Act of William III. permitted the issuing of what was known as a "Tyburn ticket" to any person who apprehended a felon. This exempted the holder from serving in any office in the parish where the apprehension had taken place. This, oddly enough, was transferable, and in consequence it had a distinct market value, varying from £12 to £40. The conviction of an alleged coiner, might thus be worth £80, and it is known that innocent people were hanged to get this money; while in 1817 eight persons were convicted of having seduced people into a criminal offence, for the purpose of obtaining the parliamentary reward on their conviction. This reward was suitably known by the sinister name of 'blood-money.'

But, as you will easily guess, the mischief did not end here. The police officer took a pecuniary interest only in £40 offenders. Fish under that weight were returned to the water that they might grow. The young offender was left alone, but watched with the solicitude of a gardener watching his plants, till under favourable conditions he grew and finally blossomed into a flower worth cutting. The thief-takers were thus directly interested in concealing and encouraging criminals till they reached the capital degree of crime. As these facts became notorious, juries became suspicious of police evidence, and often refused to convict, so that, while the hateful system led to the

occasional conviction of the innocent, it concurrently produced the constant acquittal of real offenders.

Such was the condition of affairs when in 1829 the new Metropolitan Police Force was created. The names "Bobby" and "Peeler" preserve the fame of its creator. The new force was to be under the immediate authority of one of Her Majesty's principal Secretaries of State. With some small differences in detail, that is the force, though greatly increased, which we—which you—know so well. The Metropolitan Police District has enlarged its bounds, but still within it the City of London preserves her immunity.

But London did not wait long. By an Act passed in 1839 a police force on the new military model was constituted, but placed much under the control of the Corporation, and this has remained so. Whether it is convenient to have two forces, acting independently under different Commissioners, one inhabiting, as it were, a small island, surrounded by the other—a situation which lends itself to jealousy and friction—is a question on which one would think there could hardly be two opinions.

Meantime advantage had been taken of the Reform movement to insist that the newly created boroughs should have a body of paid constables paid by the Town Councils; and in 1856, after a period of local option in police, an Act directed that all the counties which had not yet provided themselves with a paid county constabulary should forthwith do so. And in order to prevent this direction being evaded, a yearly inspection is made of the stations, the men, their number, and discipline, by Government Inspectors who report to the Home

Office; and on the Home Secretary's certificate that he is satisfied with the efficiency of the force, the Treasury pays half the cost of maintenance. The City of London pays the whole of its own bill.

The policeman is not solely employed in arresting criminals and preventing breaches of the peace. The whole of England is now policed and patrolled. The system is ubiquitous, and its high organisation has invited a constant accumulation of duties. The policeman inspects weights and measures, explosives, contagious diseases of animals, cattle trucks, common lodging-houses, and the relief of tramps. He is the handy man of the Constitution.

The closing year of the century has not only seen the Federation of an immense Continent, but a spontaneous claim on the part of our great self-governing colonies to help to bear the burden of an Imperial race. The coming century will show what voice they are to have in shaping the Empire's fortunes. Perhaps it hides from us vast Constitutional changes. Our sun, we trust, is not setting. Faith in our destiny bids us be of good cheer, and still look towards the dawn.

A. T. CARTER.

## V.

# CHANGES IN DOMESTIC LEGISLATION.

(Thursday, December 6th, 1900.)

### POOR-LAW.

In the lecture which I delivered in this hall four weeks ago, I attempted very briefly to sketch the relations which existed in the year 1800 between the King, the Prime Minister, and the two Houses of Parliament,—relations which no doubt enabled Pitt to pursue a firm and consistent foreign policy, and to oppose an effective barrier to the further extension of the military empire of Napoleon Buonaparte. It is well, no doubt, to chant the glories of the past, and to recount the victories which we then obtained on sea and land. But while England thus presented to Europe the appearance of a strong, united, and prosperous nation, the internal condition of the country was little short of desperate. The long continued war and a succession of bad seasons had sent wheat up to famine price. This enriched the farmers and the landowners, but caused great misery among the poorer classes. The value of land rose in consequence, and thereupon the landowners enclosed most of the common land. But labourers' wages did not

rise in proportion to the price of wheat, not even in agricultural districts. The farmers succeeded in steadily keeping wages down. This was partly due, no doubt, to the increase of the population, but also largely to abuse of the poor-law. An extravagant system of indiscriminate outdoor relief pauperised the able-bodied labourer; while the aged and infirm were scandalously ill-treated in the parish poorhouse. Even the rise of manufactures in Lancashire and Yorkshire, which subsequently added enormously to the wealth of the country, caused terrible distress at first by ruining many small industries. The cottage handlooms were silenced, and thousands of men and women thrown out of work. The amount of the poor-rate rose 50 per cent. The increase of poverty brought with it an increase of crime. And the manner in which the bastardy laws were administered demoralised the rural poor. In those days the newspapers did not report or comment on proceedings before country justices.

There was in the year 1800 another matter in connection with the administration of the poor-law which loudly called for reform. Our present poor-law, as you know, dates from the year 1601, when the famous statute of Elizabeth[1] was passed. This directed that officers should be appointed for each parish, called "overseers of the poor," whose duty it was to raise a common fund "for the necessary relief of the poor," and also to "set to work" all the paupers in the parish, and their children. So that in 1800 each parish separately collected and separately

[1] 43 Eliz. c. 2. For the earlier history of English Poor Relief, see an excellent book by Miss E. M. Leonard, of Girton College, just published by the Cambridge University Press.

administered its own poor fund, and each separate parish had to maintain its own poor.[1]

But it was not bound to maintain paupers that were not its own poor. The overseers could obtain an order from the justices removing any such pauper back to the parish to which he belonged, to be maintained there at the expense of that parish. But to what parish does a vagrant pauper belong? He might have been born in one parish, apprenticed in another, served as a journeyman in a third, resided in a fourth, and be now sick and infirm in a fifth parish. Which of these five parishes ought to maintain him?

The answer was that the parish in which the pauper was "last legally settled" was bound to maintain him. And there grew up a most curious and interesting branch of our law, called the law of poor-law settlement, which decided where any given pauper was "settled." It was originally almost entirely judge-made law: it is flavoured with interesting reminiscences of the feudal law of villeinage and of the Roman law of *patria potestas*. It was subsequently codified to some extent by an important Act of

[1] There were many small areas which, for quaint historical reasons, were in no parish at all. Some of them, such as the Middle and Inner Temple, Gray's Inn, and the Liberty of the Rolls, had a church or chapel of their own; but they were not parishes, and therefore did not contribute to the relief of the poor at all. They generally took care that their own possible paupers should reside outside the area, and so become chargeable to an adjoining parish. But to this an end was put by two Acts passed in 1857 and 1876 respectively, which compelled all such extra-parochial places to appoint overseers, and pay a rate in the nature of a poor-rate in aid of the common fund of the union in which each place was situate. (20 Vict. c. 19; 39 and 40 Vict. c. 61, s. 43; and see *R.* v. *Boteler*, 32 L.J.M.C. 91; 33 L.J.M.C. 101.)

William and Mary passed in 1691.[1] And according to this law there were many matters which had to be investigated before anyone could determine in what parish a pauper was "settled."

In the first place, a man might acquire a settlement by his own act. Thus, he would acquire a settlement in any given parish if he held an estate, however small, in any land in that parish, or rented a tenement there worth £10 a year, or served as a parochial officer, or paid parochial rates, or had been bound apprentice to any parishioner. An unmarried woman also might acquire a settlement in any of these ways, but a married woman could not. She could not gain a settlement by any act of her own after marriage. On her marriage she at once took her husband's settlement, if he had one; and changed it as and when he changed it.[2]

In the next place, if a pauper had never gained a settlement for himself, he might inherit one. He

[1] 3 W. & M. c. 11.

[2] But what if the husband had no settlement; did the woman lose hers, if she had one? This point was solemnly argued before Sir John Pratt, L.C.J., and the other judges of the Court of King's Bench, in the days of George I.; and the decision has been reported (and reported only) in verse:

"A woman, having a settlement, married a man with none;
The question was, he being dead, if that she had was gone.
Quoth Sir John Pratt: 'Her settlement suspended did remain,
Living the husband; but, him dead, it doth revive again.'
*Chorus of puisne judges:*
'Living the husband; but, him dead, it doth revive again.'"

(*Shadwell* v. *St. John's Wapping*, cited in *Rex* v. *Inhabitants of Norton*, Burrow's Settlement Cases, p. 124.) It was reversed in 1755 on one point by the Court of King's Bench, in *Rex* v. *Inhabitants of St. Botolph's without Bishopsgate*, ib. 367.

would in that case take his father's or his mother's settlement, if either of them had one. And whether the pauper's father or mother had a settlement depended on *their* history. Had either of them acquired a settlement in any parish? If not, then what about the grandfather? Had *he* acquired or inherited a settlement? And so on, back *ad infinitum*. If, however, it could not be shown that any of the pauper's ancestors had ever had a settlement, and he had acquired none for himself, then he was deemed to be settled where he was born. In no case could a wife be separated from her husband by a removal order, nor children of tender years from their parents.

You will see at once that without considerable investigation of the facts it was by no means easy to say which parish was bound to maintain any given pauper. Keen was the litigation and bitter the feelings which arose between neighbouring parishes—I say neighbouring parishes, because as a rule the migrations of the pauper and his ancestors were confined within a narrow compass. Orders for the removal of paupers from one parish to another were made recklessly by interested justices; and then there were appeals to Quarter Sessions, and appeals thence to the King's Bench, over which the contending parishes spent far more than it would have cost them to maintain that pauper for the rest of his life. The country attorneys reaped a regular harvest. The procedure on all such appeals was highly technical, and indeed still remains the most technical branch of our law. Many an order was quashed because it was expressed to be made by the justices "for" a certain county, not "in and for" that county. Of course the justices were in the county when they made the

order; but the order was bad if it did not state the fact. Nice questions of law would arise sometimes. Take this for instance. A man had been living in a cottage which was half in one parish and half in another. Now he had become a pauper. He had occupied the whole cottage; so he had resided in both parishes. Which was bound to maintain him? According to a venerable tradition, the Court of Quarter Sessions decided that that parish must maintain him in which his bedroom lay: for a man resides where he *sleeps*. But then it was discovered that the boundary between the two parishes went right across this room. Very well, then that parish must maintain him in which the bed stood. Further investigation, it is said, revealed the awkward fact that the bed itself stood in both parishes: the boundary between them passed under the middle of the bed. Recourse was again had to Quarter Sessions. After much deliberation it was decided that a man sleeps with his head, and not his feet, and that the pauper must therefore be maintained by the parish in which his *pillow* used to be! I will not vouch for the literal accuracy of this story; but questions of equal nicety did frequently arise in settlement cases.

Sensible men soon perceived that if a larger area was taken as the unit for poor-law purposes, much of this costly litigation would be saved. In the smaller parishes, too, the poorhouse was a miserable and sadly mismanaged institution. Hence as early as 1662 we find a few sensible parishes uniting for poor-law purposes under special Acts of Parliament, which enabled them to maintain their joint poor in one common workhouse. By a statute passed in 1782,[1]

[1] 22 Geo. III. c. 83.

commonly known as Gilbert's Act, any parishes that could agree on such a course were authorised to combine for purposes of indoor relief: and some did so combine. But the Act was merely permissive. Hence at the commencement of the century there was no systematic scheme of unions of parishes covering the whole country. The vast majority of parishes continued to separately maintain their own poor, if they could not succeed in imposing that burden on any adjoining parish.

One of the first pieces of work undertaken by the Reformed Parliament of 1833 was the entire remodelling of the administration of the poor-law. This was effected by a most valuable measure, the Poor-Law Amendment Act of 1834.[1] The Duke of Wellington described it as "the best Bill ever devised," although it was introduced by his political opponents. A central body of Commissioners[2] was appointed with very large powers. To this body was entrusted among other matters the duty of grouping parishes into "unions." The whole country was divided into these areas, of which a few were large single parishes, and the rest groups of parishes. By the same Act new bodies called Boards of Guardians were created, one in each union, and to these new bodies was transferred the duty of relieving the poor which had formerly rested on the overseers. So that a union may be defined as "the area which for poor-law purposes is under the jurisdiction of one Board of

[1] 4 and 5 Will. IV. c. 76.

[2] These Commissioners a few years later became a permanent body, under the title of the Poor Law Board; and in 1871 the Poor Law Board was merged in the Local Government Board. See *ante*, p. 122.

Guardians." Each union has its own workhouse; the parish poorhouses ceased to exist. And it no longer matters whether a pauper is settled in parish A or parish B, so long as both parishes are in the same union, as they usually are. Settlement cases now are only fought between one union and another.

The benefits which at once resulted from this wise measure are thus described by Miss Martineau in her *History of the Peace:* "The effects, which all men might own if they would, were that before two years were out, wages were rising and rates were falling in the whole series of country parishes; farmers were employing more labourers; surplus labour was absorbed; bullying paupers were transformed into steady working men; the decrease of illegitimate births chargeable to the parish throughout England was nearly 10,000, or nearly 13 per cent.; . . . and finally, the rates, which had risen nearly a million in their annual amount during the five years before the Poor Law Commission was issued, sank down in the case of the five years after it from being upwards of seven millions to little above four." [1]

The amount of litigation between neighbouring unions as to the maintenance of paupers was still further reduced in 1846 by the creation of a new "*status* of irremoveability," as it is called. If a man had resided in a parish for five years, no order could be made for his removal from that parish, even though he was legally settled elsewhere. If he, as the phrase was, had had his "industrial residence" in parish A, he was irremovable from that parish. If he liked to go back to his own parish of his own accord, well and good; his own parish could not

[1] Miss Martineau, *History of the Peace*, vol. ii. p. 511.

send him back to A. But, so long as he chose to stop in A, A had to maintain him, and to educate his children. In 1861, a period of three years' residence in any parish in the same union was substituted for five years' residence in the same parish; and in 1865 the period was still further reduced, and one year's residence anywhere in a union made a pauper irremovable. This greatly reduced the number of removal orders. Lastly, by the very sensible provisions of the Divided Parishes and Poor Law Amendment Act, 1876,[1] it was provided that any pauper who resides for three years in any parish in such a manner and under such circumstances in each of such years as would have rendered him under the old law irremovable from that parish, will thereby acquire a settlement in that parish. It also declared that in future no one, except a child under 16, should derive a settlement from a parent or other ancestor. So that now a man or an unmarried woman who has not acquired a settlement for himself or herself is settled where he or she was born; a married woman takes her husband's settlement; a child under 16 takes the settlement of his father or widowed mother till it acquires a settlement for itself; and all prolonged investigations into the settlements of remote ancestors are absolutely unnecessary.

As to the vexed question of out-door *versus* in-door relief, the guardians must exercise their discretion. Any person who is really destitute is entitled to be received into the workhouse of whatever union he happens to be in and to be relieved there, till it is proved that he is legally settled else-

[1] 39 and 40 Vict. c. 61, s. 24.

where. And the guardians are no longer compelled (as formerly they were) to separate man and wife, if they come into the "house." Married people may now be allowed to remain together, if they are over sixty years of age, or if they are infirm. In London, and other large towns, "casual" paupers can be received and given temporary relief, provided they pay for it by doing some work the next morning. But no one is entitled, as of right, to out-door relief—that is, no one can demand as a right that he shall have money or food given to him in his own house, without going into "the house." Out-door relief should not be readily granted. When it is granted, it is often safer to grant it in kind rather than in money.

In 1800, as I have said, out-door relief was granted recklessly and even corruptly in very many of our country parishes; granted freely to undeserving persons and to able-bodied labourers who could easily earn their own living. And this system is very difficult to eradicate. Country guardians still seem to imagine that out-door relief costs less than in-door relief, which it certainly does not in the long run. The Poor Law Commissioners issued an Out-door Relief Prohibitory Order in December, 1844. The Poor Law Board issued an Out-door Relief Regulation Order in December, 1852; and the Local Government Board, as soon as it was created, called attention to the matter again in its first annual report, and in many subsequent circular letters to guardians. As recently as 1881, the Local Government Board still had occasion to complain that in some unions "the old abuse of relief in aid of wages largely prevailed in some form or other." In some unions, on the other

hand, the workhouse test is rigorously imposed—sometimes too rigorously; so that the practice is very varied. Thus in Wales 81·5 per cent., and in the South-Western counties 75·6 per cent., of the total amount spent in relieving the poor was expended in out-relief: in London only 19·5. Different methods may suit different localities, and the guardians must be allowed to have a free hand in special cases. Still, it would be well, I think, if greater uniformity existed in the administration of out-door relief.[1]

## PUBLIC HEALTH.

From the Poor Law I turn to Sanitary Legislation. In 1800 there was no sanitary legislation whatever. In 1800 there were no sewers, and hardly any drains. A house in a town probably had a cesspool which was generally placed under the kitchen floor. A house in the country had no water-closet at all; which after all is the safest plan. And there was no local sanitary authority or Board of Health to interfere with primitive simplicity in such matters, or to deal with epidemics of infectious disease. At common law, no doubt, a nuisance injurious to health was indictable. If a man created a nuisance to his neighbours by collecting sewage on his land or in any other way, he could have been fined—though I doubt if he ever was. The now obsolete Courts Leet seem also to have possessed, and occasionally to have exercised,

[1] However it is satisfactory to know that in 1900 the number of persons who received out-door relief was less by 378,024 than the number of persons who received out-door relief in 1849. There was an increase of 81,864 during the same period in the number of persons receiving in-door relief. (Local Government Report for 1899-1900, p. liv.)

some control in sanitary matters. The court rolls of Stratford-on-Avon show that in 1552 Shakespeare's father was fined for depositing filth in the public street in violation of the bye-laws of the manor, and again in 1558 for not keeping his gutter clean. It is no wonder Shakespeare's two elder sisters died of low fever in early infancy. But the function of the common law begins and ends with the punishments of individuals. It knows nothing of prevention or cure. It has no machinery for dealing with those insanitary conditions which must arise when human beings are massed together in cities and towns. Hence the aid of the Legislature had to be invoked. At the same time I venture to remind you that legislation alone will not prevent the spread of disease. The co-operation of the public is necessary; and the best way to secure that co-operation is surely by teaching the public the properties and the causes of each preventible disease.

In matters connected with local government, the Legislature usually proceeds by very gradual and tentative steps. What generally happens is this: a few enterprising and enlightened towns or districts take the lead and apply to Parliament for special powers in their own locality: other districts slowly follow their example; then when public opinion is fairly ripe, an Act will be carried through Parliament which applies to the whole country generally. At first this will only be a permissive measure: it will be open to any locality to adopt it or not, as it thinks fit. Then when many localities have adopted it, and in those localities it is found to work well, a subsequent Act is passed, making it compulsory throughout England and Wales. So it was with sanitary legislation. As early as the reign of George II., the more

populous and wealthy towns began to apply to Parliament for special legislation in their individual cases; and from that date down to the present time, numerous special Acts have been passed conferring on various populous places powers of local government. In the earlier instances these Acts dealt chiefly with the paving, lighting, cleansing, and improving the districts within their scope, and contained no provision whatever for the drainage either of streets or houses. The later Acts all recognise the importance of sanitary regulation, and make some attempt to provide for the removal of nuisances and to deal with other sanitary problems.

But these provisions were often a dead letter. The members of the various authorities did not yet understand the importance of sanitary regulation, or else they purposely shut their eyes to the condition of things around them. In Liverpool, 39,000 persons huddled for shelter in cellar-dwellings, though a local Act forbade the use of insanitary cellars as dwellings. Glasgow and London had courts and alleys which were given up to filth, crime, misery, and disease;[1] while the condition of Clitheroe and other rising manufacturing towns, which had no local Act, beggars all description.

The Lighting and Watching Act, 1833, was a step towards more general legislation. It provided for lighting and watching in parishes; enabled the rate-payers to appoint inspectors, who might contract for works; and imposed penalties for contaminating water by gas. The Act was permissive. Its provisions might be adopted in any parish by resolution

[1] See the Report of Dr. Southwood Smith, "on the prevalence of fever in Twenty Metropolitan Unions," 1840.

of the vestry duly convened for that purpose; they were so adopted in many parishes.

In 1847 the Towns Improvement Clauses Act, the Towns Police Clauses Act, the Water-works Clauses Act, the Gas-works Clauses Act, with several similar Acts, were passed for the purpose of consolidating and generalising the provisions usually required in local Acts for various public purposes. Their object is to supply model clauses, which can be adopted by reference into local Acts. With a few exceptions their provisions have been adopted into all subsequent local legislation. Under these Acts districts were formed, called "Improvement Act districts," governed by "Improvement Commissioners." About fifty of these districts continued down to 1894, when they merged in the new county districts then created. It was the Towns Improvement Clauses Act of 1847 which first created those two most praiseworthy and efficient officers, the Officer of Health and the Inspector of Nuisances. But it only *enabled* the local authority to appoint these officers, if it thought fit. In 1855 every vestry and District Board in the Metropolis was required to appoint a Medical Officer of Health and an Inspector of Nuisances. But it was not till 1875 that the Legislature made it the imperative duty of every local sanitary authority to appoint these officers, without whose assistance the sanitary law can only be spasmodically enforced.

The cholera, which had made its appearance in England in 1832, visited the country again in 1847 and 1848. And in 1848 was passed the first Public Health Act—a great and comprehensive measure, which may be called the foundation-stone of our

sanitary law. Like many other beneficial Acts it did not apply to the Metropolis, but was intended mainly for other large towns and populous places, in which sanitary regulations were urgently needed, owing to the rapid increase of the population. This Act created a General Board of Health, which was empowered to appoint inspectors to see that the provisions of the Act were carried out, and also to create Local Boards of Health. In ordinary cases a Local Board of Health could only be created on the petition of the ratepayers. But where the rate of mortality was exceptionally high the General Board of Health might act of its own motion. In municipal boroughs the Town Council was constituted the Local Board ; in other places the Board was elected by the ratepayers. Local Boards were empowered to construct and manage sewers, drains, wells, water and gas works ; to deal with deposits of refuse, closets, and slaughter-houses ; to regulate offensive trades ; to remove nuisances ; to protect water-works from pollution ; to pave and regulate streets ; to regulate dwellings and common lodging-houses ; to provide burial and recreation grounds ; and to supply public baths with pure water.

I have already stated that any act or thing which seriously endangers public health, or interferes with public convenience, is a nuisance indictable at common law. But proceedings by way of indictment are often slower and more expensive than summary proceedings before magistrate ; and prompt action is urgently needed in the presence of any nuisance which generates contagious disease. Hence from time to time Acts were passed giving justices of the peace power summarily to order the removal of nuisances. The first

of these was passed in 1846.[1] In 1855 two Acts were passed, called the Nuisances Removal Act and the Diseases Prevention Act,[2] both of which were amended by the Removal of Nuisances and the Prevention of Diseases Act, 1860.[3] In 1863 it was further made the duty of a Board of Guardians to see to the sanitary condition of bakehouses, in which the food of the poorer classes was cooked. From 1872 to 1894 (when District Councils were created) the sanitary authority in every rural district was the Board of Guardians; in every borough, the Town Council; in every Improvement Act district, the Improvement Commissioners; in certain ports, the Port Sanitary Authority; in every other urban district a Local Board of Health.

We now come to that most valuable measure the Public Health Act of 1875. This statute repealed the Act of 1848 and twenty-nine of its amending Acts, and re-enacted them in a condensed and intelligible form. It does not apply to the Metropolis, but it is a sanitary code for the rest of England. Several Acts amending or extending it have since been passed, but, with few exceptions, the general law with respect to sanitary matters is to be found in this Act of 1875. One of these amending and extending Acts deserves special mention, for it supplied a most necessary link in our machinery for the prevention of infection. It was of little use to empower a Local Board to order a house to be disinfected, and to order infected clothing to be burned, if no method was provided by which the Board could be informed in which houses infection

[1] 9 and 10 Vict. c. 96. [2] 18 and 19 Vict. cc. 116 and 121.
[3] 23 and 24 Vict. c. 77.

was rife. Such machinery was provided in 1889 by the Notification of Infectious Diseases Act, 1889, which made it the duty of the relatives of everyone suffering from an infectious disease, of his medical attendant, and also of the occupier of the house in which he is, to give notice at once to the Medical Officer of Health for the district of the name of the patient, the situation of the house, and the nature of the infectious disease from which the patient is suffering. This Act too was at first merely adoptive —that is to say, it only operated outside the Metropolis in such districts as thought fit to adopt it. But 1549 districts out of 1772 did adopt it, and it has now been made compulsory all over England and Wales.[1] Power, too, has been given from time to time to our local bodies to clear away "rookeries" and to deal with insanitary areas—work which has to be executed most carefully, lest it result merely in increasing the population of adjoining streets and courts which are already overcrowded. Such are Torrens' Act of 1868, Sir Richard Cross's Acts of 1876, 1879, and 1882, and the Housing of the Working Classes Acts, 1885, 1890, and 1894.

And our sanitary legislation has undoubtedly borne good fruit. It has practically stamped out typhus fever, a disease which formerly slew its thousands every year. Compulsory vaccination has enormously reduced the number of deaths from small-

[1] By the Infectious Disease (Notification) Act, 1899. Mention should also be made of the Infectious Disease (Prevention) Act, 1890, and the Public Health Acts Amendment Act, 1890. Part I. of the latter Act extends to all England, Wales, and Ireland; Parts II., III., IV. and V. only apply in such districts as may adopt them.

pox, and so far at least no harm appears to have been done by the last Act on the subject—the Vaccination Act, 1898. The general health of the population has largely improved, and the expectation of life has perceptibly increased. In the year 1881, 16,000 persons died from scarlet fever and 5,000 from small-pox. In 1899, 2,317 persons died from scarlet fever, and only 149 from small-pox. In the year 1847 the death-rate was 24·7 per thousand of the population; for the year 1898 it was 17·6. This lower death-rate implies the survival of over 2,000,000 persons who, according to the previous rate of mortality, would have died. And the gain does not consist merely in the saving of life. Infectious diseases maim and enfeeble those who ultimately recover; they inflict on those who survive as well as on those who succumb an enormous amount of pain and misery and pecuniary loss which might have been prevented by efficient precautions. Unhealthy surroundings impair a man's vitality and diminish his power of work. Overcrowded dwellings lead to immorality and crime. You cannot over-estimate the importance of sanitary legislation.

## BURIAL.

There is one other matter connected with our sanitary law to which I must briefly allude. The burial of the dead may be so conducted as to be a source of danger to the living. Cremation is a perfectly lawful method of disposing of a dead body, so long as it is not resorted to in order to avoid a coroner's inquest, and provided also the process is so conducted as not to be a nuisance. Still, burial has

always been the usual method adopted in this country. At Common Law every person who dies in any parish in England is entitled to be buried in the churchyard of the parish church of that parish, unless he is unbaptised, or excommunicate, or has committed suicide. It does not matter whether he is a Churchman or a Dissenter, whether he is a parishioner or not; he is entitled to be buried in the churchyard of the parish in which he dies, so long as there is room for him there. And by virtue of two Acts[1] passed in 1808 and 1886 respectively all dead bodies cast on shore by the sea, or any navigable river, or floating or sunken in any such waters, if unclaimed by their relatives, must be buried by the churchwardens and overseers of the parish in which they are found, in the churchyard and at the expense of that parish.

But as the population of England increased, parish churchyards became insufficient to meet the requirements of the parish. Hence even before the year 1800 we find that cemeteries were made and maintained as commercial undertakings under special Acts of Parliament. After 1800 these undertakings increased in number; so that in 1847 it was deemed expedient to pass the Cemeteries Clauses Act, which contains a series of model clauses for adoption into such special Acts. The need for such cemeteries was increased by two very sensible provisions. In 1848 burial in or underneath any church or chapel built in any urban district was forbidden on sanitary grounds,[2] except by special leave; and in 1852 power was given to the Privy Council to close any burial-ground within the Metropolis whenever it

[1] 48 Geo. III. c. 75; 43 Vict. c. 19.
[2] Public Health Act, 1848 (11 and 12 Vict. c. 63, ss. 82, 83).

was necessary for the protection of public health that burials should be discontinued there.[1] Many burial-grounds and churchyards have been closed under these and similar Acts.

In 1879 these Cemeteries Clauses were incorporated into the Public Health Act by the Public Health (Interments) Act, 1879. This enabled any sanitary authority, rural or urban, to make and maintain a cemetery for its own district and to exercise all the powers given by the Act of 1847. Moreover, under the Act of 1879, the Local Government Board has power to compel a District Council to provide a cemetery when one is urgently needed; as, for example, where there is insufficient burial accommodation for the neighbourhood, or where the water-supply of the locality is polluted by the existing cemetery or churchyard, or the health of the inhabitants otherwise endangered.

But side by side with this legislation there ran a second set of Acts dealing with the same subject. This often happens in a country where our legislators need know no law. This second string to the legislative bow consists of the Burial Acts, 1852 to 1885, which enabled any parish district or township to provide itself, not with a "cemetery," but with a "burial-ground." You appreciate the distinction, no doubt. These statutes were merely permissive, any parish district or township might or might not adopt them. And as was then the fashion, the legislature created an entirely new local authority, called a Burial Board, which consisted of from three to nine members elected by the vestry. A Town Council or other urban sanitary authority can also in certain circumstances

[1] 15 and 16 Vict. c. 85, s. 2.

acquire the powers of a Burial Board, and provide a burial-ground for its own district. But a rural sanitary authority could never provide a burial-ground; it could only have a cemetery; why, I cannot say.

There were many other (wholly unnecessary) refinements and distinctions between "cemeteries" under the Cemeteries Clauses Act, and "burial-grounds" under the Burial Acts. But many of these have been removed by the Burial Act, 1900.[1]

## EDUCATION.

So much for the law of Public Health. But the sound body should contain a sound mind. What did the State do for education in the year 1800? Absolutely nothing. Pious founders in past ages had endowed colleges and schools, and "as in private duty bound," I especially desire to record the gratitude which I and so many others owe to that young king who founded grammar schools throughout the country, trying thus to mitigate the mischief done by his royal father, Henry VIII. But the State founded no colleges, created no scholarships. There was no State education or inspection in 1800. Such matters were left entirely to the churches and to private voluntary effort.

In 1808 was founded the British and Foreign School Society; and in 1811 the National Society—both large educational bodies, entirely supported by voluntary subscriptions, the former unsectarian, the latter belonging to the Established Church. It was not till 1834 that the schools established by these agencies received any grant from Government; but in that

[1] 63 and 64 Vict. c. 15.

year they received among them £20,000. In 1839 the amount of the vote was increased to £30,000; and at the same time the first attempt was made towards an Education Department. A Committee of the Privy Council was appointed, on the motion of Lord John Russell, to "superintend the application of any sums voted by Parliament for the purpose of promoting public education." This Committee appointed inspectors to visit the schools and report on their efficiency, and the amount of the grant was made to depend on the inspector's report. In 1846 grants were for the first time made to training colleges for teachers. But down to the year 1870, apart from the inspection of schools and training colleges, and the subsequent distribution of the Government grant, the State took no part in the work of national education.

The present system of public elementary education dates from 1870. It was then found that more than a million children in England were receiving no education at all. So Mr. Forster brought in his famous Act,[1] and for the first time established the principle that it was the duty of the State to supply adequate school accommodation wherever private effort fell short of the needs of the population. For this purpose, the whole country was divided into school districts. The whole Metropolis is one district. Every borough outside the Metropolis is a school district. Every parish, not included in the Metropolis or in a borough, is also a school district.[2] In every school district there must be either

[1] The Elementary Education Act, 1870 (33 and 34 Vict. c. 75).

[2] Unless an order has been made by the Education Department grouping it for education purposes with other parishes. This is often done with small contiguous parishes.

a School Board or a School Attendance Committee. A School Board must be elected in every district in which the public elementary school accommodation has been found insufficient. Where the accommodation is sufficient, the ratepayers may still have a School Board if they wish, but if this be not desired then the Town Council, or the Urban District Council, or the Board of Guardians, must appoint not less than six nor more than twelve of their members to be a School Attendance Committee, to enforce the attendance of the children at the schools which have been provided for them.

A later Act, the Elementary Education Act of 1876,[1] went a step farther and made it the duty of the parent of every child to see that his child did receive efficient elementary education. It also prohibited the employment of the children in any work which would interfere with their education. And further steps have since been taken in this direction by salutary Acts passed in 1880, 1893, 1899, and 1900;[2] till now it is the law that no child under the age of twelve can be employed in any work that prevents his regular attendance at school, and that no child between twelve and fourteen can be excused from school attendance, either wholly or partially, until he has reached a certain standard of education fixed by the bye-laws in force in his district. In most parts of the country, a child over twelve can obtain partial exemption from school, and so work half-time in a factory or workshop if he has reached the fifth standard, or has for five years registered 350 attendances in not more

[1] 39 and 40 Vict. c. 79.

[2] 43 and 44 Vict. c. 23, s. 4; 56 and 57 Vict. c. 51; 62 and 63 Vict. c. 13; 63 and 64 Vict. c. 53, ss. 1, 6, and 7.

than two schools during each year. In London, where the children are, perhaps, sharper than they are in some agricultural districts, a stricter rule applies. No half-time is now allowed in London, nor any exemption on 350 attendances. By the new bye-laws, which have been passed by the Board of Education and come into force on the 17th of this month, every child below twelve must attend school regularly for the full time, and so must every child between twelve and fourteen who has not reached the seventh standard. Moreover, under an Act of 1893,[1] a blind or deaf child may be compelled to attend school till he or she is sixteen years old. And by an Act of 1899,[2] special provision is made for the education of defective and epileptic children.

It will be observed that at present the State only insists on every child's receiving efficient elementary education. And you will probably ask, what amount of education is deemed elementary? Well, elementary education meant originally reading, writing, and arithmetic: it now means a good deal more. Exactly how much more it means depends largely on the bye-laws in force in any school district. If the local school authority thinks fit it may expend the money of the ratepayers in teaching many other subjects besides reading, writing, and arithmetic, provided such other subjects are included in a "Code," which is issued annually by the Board of Education. Nothing that is outside that code can be taught by a School Board at public expense.

Before long, no doubt, the State will go a step further and provide secondary education, and thus erect a ladder by which any poor child of ability may

[1] 56 and 57 Vict. c. 42. [2] 62 and 63 Vict. c. 32.

climb up from the Board School to the University. The Evening Continuation Schools are a step in this direction. County Councils, too, are empowered to devote a portion of the funds at their disposal to organising or assisting technical instruction. But so far Englishmen do not appear to understand what technical instruction is,—still less how to give it. Except, of course, in law.

## LOCAL GOVERNMENT.

So far, then, I have briefly touched on the administration of the poor-law, the sanitary law, the Burial Acts, and the Elementary Education Acts. There are many other matters which have been made the subject of local administration; but with these I have no time to deal to-night. All that I can do is briefly to describe the condition of local government in the year 1800, and to contrast it with the happier state of things which now exists, thanks to the new machinery provided for us by the Local Government Acts of 1888 and 1894.

In 1800, for all practical purposes, there were only three local authorities and three areas of local government:

1. The County, which was governed by the Justices of the Peace in Quarter Sessions assembled.
2. The Borough with its Town Council.
3. The Parish with its Vestry.

There was no area corresponding to the modern union, or the sanitary district, or the petty sessional division. The hundred which in ancient Saxon days

came between the township and the shire was almost obsolete as an administrative area; though a high constable was still elected for old custom's sake, and the hundred was still liable in case of a riot.[1]

### 1. *The County.*

In the counties there was little ground of complaint, except what some people would call a constitutional and others an academical grievance, namely, that an institution originally democratic had by some mysterious process become aristocratic. The Saxon Shire-moot was largely a representative gathering; the earl, the bishop, and certain other magnates attended in their own right; but each township was represented by its "reeve," and four "best men." When the shire became the county, the Shire-moot became the County Court. Gradually the representatives ceased to attend; and the County meeting came to consist solely of landowners. Subsequently all except the more important landowners became more and more remiss in their attendance at these gatherings; and ultimately the whole management of the affairs of the county fell into the hands of the justices of the peace, who are appointed by the Crown on the nomination of the lord-lieutenant, and over whom the county ratepayers have no control whatever. And this continued till 1888.

You may think it strange, that at the very time when representative government was becoming the rule in local as well as political matters, county government should have become a conspicuous ex-

[1] This continued till 1886, when the Riot (Damages) Act (46 and 50 Vict. c. 38) was passed.

ception. For historically the counties had every claim to an elective government; and, logically, every reason which can be urged in favour of a representative system as regards the Central Government or as regards other local authorities, applies equally to the county. But that is how most things grow up in England—gradually, spontaneously, and therefore irregularly and unsymmetrically.

And no one minded. Till the end of this century, no one ever sought to introduce any principle of representation into the government of the counties. The justices, as a rule, managed the county business well; and the county electors, illogically but sensibly, acquiesced in a system of class government which was wholly foreign to our English institutions. Most Englishmen, as a rule, care little for symmetry. The fact that an institution is anomalous, or that an illogical compromise had been adopted in its administration does not trouble them, so long as the institution works even tolerably well. "Nor am I confident they err. Are you?"

## 2. *The Borough.*

Turning now to the boroughs we find a much sadder picture. In 1800 there were 284 boroughs or reputed boroughs in England and Wales. But in at least 32 of them municipal institutions were extinct, and in most of the others municipal life was dead. The great mass of the townspeople were excluded from corporate privileges and from any share in the government of the town. The power was entirely in the hands of a few councillors or corporators, who were for the most part self-elected, and who held

office for life. They were selected on political grounds; so were the borough officers; so were the freemen. The corporate revenues were expended and the local charities manipulated to serve political ends. Municipal functions were almost entirely neglected, and jobbery, corruption, and oppression were almost universal. Everything was prostituted to maintain the political ascendency of a party or the political influence of a noble family. Never again, I trust, will any of our local institutions sink to so degraded a level. In Plymouth, where the population was 75,000, the number of freemen was only 437, of whom 145 were non-resident. In Ipswich, less than two per cent. of the inhabitants enjoyed corporate privileges, and of that two per cent. a large number were paupers. In Portsmouth, with a population of 45,000, the number of freemen was only 102. As a rule, the numbers of the privileged freemen were strictly kept down, but political exigencies sometimes created an exception. Thus at Maldon, where the average admission of freemen was seventeen per annum, 1000 new freemen were created during the election of 1826, for purely election purposes. The freemen in many boroughs enjoyed exclusive trading privileges, and were exempt from borough tolls and market dues. In Newcastle his exemption from these tolls made a difference to one merchant of £450 per annum. In Liverpool the tolls were even heavier. Corporate funds were freely spent in political corruption. During the election of 1826 the corporation of Leicester spent £10,000, and even mortgaged a portion of their property to secure the return of a political partisan. When not required for electioneering the income

of the corporate property was "frequently expended in feasting."

The same man held several corporation offices, and appointed deputies to perform the duties. Members of the corporation entered into contracts with the corporation, and lands belonging to the corporation were let to members of the corporation on terms very favourable to the members. Only 28 boroughs published any accounts of their expenditure. In some boroughs the Coroner was a small tradesman. In many boroughs where the Recorder had large criminal and civil jurisdiction, he was not necessarily a lawyer. In nearly all boroughs the aldermen were *ex officio* magistrates. The juries were taken exclusively from the freemen, and the administration of justice was tainted with political partisanship. At Haverfordwest it was freely stated that "it was impossible to convict a burgess." The corporate magistrates, apart from political bias, were often wholly unfit for the discharge of judicial functions. At Malmesbury some of the magistrates could not read or write. At Wenlock it was their habit to sign blank warrants. At East Retford a magistrate on one occasion amused himself by fighting the prisoner.[1]

But the Reform Act of 1832 brought in a new *régime*. The members of the first Reformed Parliament of 1833 knew but too well what abuses existed in the boroughs. One of their first acts was to appoint a Royal Commission to enquire into the condition and management of 246 municipalities. The report of this Commission is most interesting and instructive reading.

[1] Report on Municipal Corporations, 1835, pp. 38, 54.

It appeared in 1835, and very effective legislation followed in the same year. The Municipal Corporations Act, 1835 (5 and 6 Will. IV. c. 76), swept away the abuses laid bare by the Report. It took as a model the best of the few boroughs which were well administered—for there were a few in which the abuses detailed above did not exist—and provided a uniform constitution based on this model, which, with slight modifications, was made to apply to all towns then or thereafter to be brought under the Act. It took away magisterial powers from the Aldermen, provided that the Recorder should be a trained lawyer, abolished all trading monopolies, exemptions, and restrictions, shortened the tenure of elective offices, gave the franchise to all inhabitant ratepayers, and provided for the honest administration of corporate funds and the efficient discharge of municipal duties. It was at first intended to bring London under the Act, but the intention was temporarily abandoned, and down to the present day the Corporation of London retains its ancient constitution. This Act of 1835, which is the great charter of English municipal liberty, was amended by no less than forty-two subsequent enactments. The whole, however, are now brought together and reproduced in the Municipal Corporations Act, 1882,[1] which is one of the best drafted Acts on the statute book; we have in it a complete municipal code.

### 3. *The Parish.*

Long before the year 1800 the parish had swallowed up the Saxon township, the Norman vill, and

[1] 45 and 46 Vict. c. 50.

the feudal manor, and become the unit of area for all administrative purposes. It is true that some Courts leet and Courts baron were still held in many parts of England (as indeed they still sometimes are), and the lord of the manor still sometimes appointed the parish constable. But for all practical purposes the manor with its manorial courts had ceased to be a factor in local government. The parish meeting was no longer held in the parish church, but in the vestry. And from this new place of meeting the parish meeting itself took a new name, and was henceforth known as "the vestry." The parish priest still presided. Every parishioner, whether male or female, whether a churchman or a dissenter, and later every ratepayer, whether a parishioner or not, was entitled to attend the meeting and to vote. But as the population increased no vestry could hold them; and, what is more, no room in the parish could hold them. In a few parishes the sensible custom arose of electing representatives to act for their fellows: such representatives were called "vestrymen." But this was only in a few of the larger parishes; in the rest the bulk of the parishioners simply stayed away—with this result, that many parishes were ruled entirely by the rector, a few more by the squire, but most by a small clique of pushing ratepayers who took care to come early to the meeting, and filled the vestry, and had it all their own way, unless some one demanded a poll.

But even before the Reform Bill was passed the zeal of the reformer was busy among the country parishes. In 1831 an Act was passed which is commonly known as Hobhouse's Act.[1] It was merely a permissive measure. It enabled any parish

[1] 1 and 2 Will. IV. c. 60.

which possessed more than 800 ratepaying inhabitants to create a statutory select vestry and elect vestrymen to manage their local affairs. The clergyman of the parish and the churchwardens were made *ex officio* members. And the Act actually directed that the accounts of all parish charities should be audited, and, what is more, published. That was indeed a step in the right direction.

## CHAOS.

Then, as you know, in 1834 our poor-law system was entirely remodelled. And fitful attempts were constantly made to remedy the eccentricities and remove the shortcomings of all our local institutions. But in these attempts, too, there was no cohesion, no system, scarcely any guiding principle. Everything was done piecemeal. Each special need was dealt with separately. Benevolent persons, who desired to reform the poor-laws in the days of William IV., had no knowledge of sanitary science, and had no desire to interfere in the management of bridges and highways. They thought only of poor-law reform, and therefore created an entirely new and independent area—the union. And as the nation developed, as its population and wealth advanced, and its requirements necessarily increased, new local authorities were created to meet each special need—Highway Boards; Conservancy Boards; Local Boards of Health; Improvement Commissioners; Commissioners of Baths and Washhouses; Port Sanitary Authorities; Burial Boards; and School Boards. And, following the precedent of the unions, this was done in each case without any regard to

previously existing divisions or authorities. Each new creation paid no heed to, and seemed to have no knowledge of, any of its predecessors; each went its separate way, making no attempt at collaboration. The Burial Board knew not the Highway Board; and neither of them took cognisance of the vestry, the guardians, or the county: the areas governed by these authorities were almost invariably different; and there were eighteen different kinds of rates, most of which were separately collected.

The result was that "jungle of jurisdictions," that "chaos of areas, chaos of authorities, and chaos of rates," which Mr. Chalmers so vehemently and so properly denounced in the excellent little volume on "Local Government" which he published in 1883. And this lack of symmetry and system produced bad effects from which we suffer still.

(i.) In the first place it led to extravagance. Every little board or authority had its own staff of officers and rate collectors kept up at the expense of the public.

(ii.) Next, it led to confusion. There was a needless multiplication of elections as well as of officers. The elections of the different local authorities are held at different times. The qualifications of electors and candidates differed in each case, as did also the mode of election, the returning-officer and his staff, and the period for which office was held.

(iii.) Then again, it led to apathy in the electorate. So great was the confusion of areas and the conflict of authorities that no ordinary ratepayer when he was asked to vote for a guardian or a vestryman or a member of a District Board had any idea where

the duties of the one ended and the duties of the other began. They all meant rates; that he knew by painful experience; but he made no attempt to ascertain how the rates were expended; still less did he make any effort to check the expenditure. The problem was too vast, too complicated. He had neither the time nor the knowledge necessary to enable him to supervise the working of such complicated machinery. Hence the electors had practically no control over their own representatives.

Reform was urgently needed in two directions—the consolidation of authorities and the simplification of areas. And this much-needed reform has been given us by two excellent statutes—the Local Government Act of 1888 and the Local Government Act of 1894—the value and importance of which the nation has not yet fully realised. The Act of 1888 created the County Council; it created also the administrative county. It reintroduced popular representation into the management of the county. It took away from the Justices of the Peace their administrative duties, leaving them, however, their judicial functions. The Act of 1894 created the Parish Council and the District Council, and thus restored to rural England the ancient threefold organisation of Anglo-Saxon times. Township, hundred, and shire reappear as parish, district, and county. And each has its own appropriate assembly. In urban districts where the population is more closely massed together the Parish Council is dispensed with, and there are only the District Council and the County Council. All Local Boards, all Highway Boards, all Turnpike Trusts have ceased to exist. Very few Burial Boards remain. In rural

districts every District Councillor is also a guardian of the poor. And now the question has been mooted whether the School Board should not be made a Committee of the District or Borough Council.[1]

## LONDON GOVERNMENT.

I must say a few words in conclusion about the local government of the Metropolis which has always been reserved for exceptional treatment. The history of London is to a great extent the history of a wall. Who built this wall no one knows—let us call him Balbus. For he was a Roman; he was Prefect of

[1] It may be useful to sum up the figures thus: There are now 7310 Parish Councils, 1465 District Councils (urban and rural), 335 Borough Councils, 62 County Councils, 2527 School Boards, 649 Boards of Guardians, and 276 Burial Boards. There are 14,896 civil parishes in England and Wales, and in each of these a parish meeting must assemble at least once in every year if there is a Parish Council for that parish; at least twice in every year if there is no Parish Council.

And these local bodies deal with an enormous mass of work, and work of a most varied kind. They light and pave the streets, and see to the sewerage; they supervise common lodging-houses and workmen's dwellings; they check the adulteration of food; they regulate sky-signs and overhead wires; they preserve open spaces and recreation grounds; they organise or assist technical education; they provide, maintain, and visit pauper lunatic asylums, reformatories, and industrial schools; they prevent the pollution of rivers; they protect wild birds and conserve fish; they grant licenses for music and dancing, and for race-courses, knackers' yards, slaughter-houses, and cow-houses; they appoint medical officers of health, inspectors of nuisances, coroners and surveyors, public analysts, inspectors of weights and measures, and officers under the Explosives Act. The County Council maintains the county bridges and all main roads; the District Council repairs all other high roads, which are repairable at public expense; while the Parish Council protects the humble footpath.

the Roman Colony of Augusta somewhere between A.D. 350 and A.D. 370. He was a capable and intelligent man ; he was a statesman ; for he looked ahead and did what was best for the infant municipality which was then growing up within half a mile of this hall. And he built that Roman wall round London which had a large share in creating the problem which Mr. Balfour had to solve last year. Little did this Balbus dream that his wall, so admirable in itself, would cause us trouble fifteen centuries after his death ! He took care that the wall should be thoroughly well built ; and he allowed, as he thought, ample room for later growth. The exact position of this wall is well known to antiquaries. Many portions of it still remain ; it included in its ambit about a square mile of territory, with wells and trees, gardens and pastures, bordering on the great Roman roads.

For a thousand years or more this area was sufficient for all purposes. The Saxons drove out the British, the Danes the Saxons ; King Alfred re-established Saxon supremacy in A.D. 886, and at once repaired the wall. He welcomed strangers from the Continent and gave them civic rights. Saxons, Danes, Frenchmen, and Germans came and settled in the resuscitated city, and still there was ample room for every one within the Roman wall. From the battlefield of Hastings the Norman Conqueror sent a "friendly" letter to London promising to preserve the rights of the citizens ; they should retain their customs, and no man should do them wrong. From the Plantagenet Kings the merchant princes of London wrested one privilege after another—the right to hold their own Courts, to

elect their own bailiff or mayor, to commute uncertain tallages for a fixed annual payment, etc. For these privileges the city paid dearly at the time in blood and money; but, as each successive privilege was acquired, the city grew in wealth and importance, and was recognised more and more as "a joyous place" in which to dwell. And there were still green fields and country lanes within the city wall, till the Red Rose and the White Rose ceased to quarrel and the Tudor Kings began to reign.

By this time there were, no doubt, scattered houses skirting the great roads outside the walls, and these houses grew more numerous as you approached the city gates; but, so far as we now can guess, it was not till the sixteenth century that any Londoner felt cramped within the wall and craved more elbow-room. Gradually the city expanded, and at first it incorporated its extra-mural parishes, such as Bishopsgate and Farringdon Without. Then its natural expansion stopped. Difficulties of all kinds arose. In early times military considerations had weight. How could dwellers in the open country far from the wall be protected in case of a siege? Later, commercial considerations prevailed; questions of tolls and dues and city markets came to the fore. The citizens of London had always looked down upon the dwellers in Middlesex. Were these now to be admitted to enjoy the privileges and to share in the property of the citizens? And, on the other hand, the dwellers in the suburbs were by no means anxious to be included in the city, and to submit to the regulations of the Guilds or to the jurisdiction of the Court of Aldermen and the Court of Common Council. Westminster, under Royal favour, had

itself become a separate city; and so long as there was a convent on the site which we now call Covent-garden, the monks preferred to be directly under the jurisdiction of the King, and not to be drawn within the boundaries of the city. Thus the growth of the municipality was checked, though the houses outside the city increased rapidly in number. Queen Elizabeth and James I. made repeated proclamations forbidding the erection of any more houses within three miles of London under penalty of imprisonment and forfeiture of the materials; but these proclamations had little effect, except to bring fees for dispensations into the Royal treasury. Houses stretched eastward through Aldgate along the Mile-end-road, northward to Clerkenwell and on towards Islington, and westward along the Strand towards Westminster. The church of St. Martin-in-the-Fields no longer deserved its name, though partridges were still shot in Queen Anne's reign on the spot which we now call Regent Street.

Then as the eighteenth century advanced, the population of London rapidly increased, and more and more houses were built, especially on the south side of the Thames. And so, when we come to the year 1800, we find this state of things existing. In the middle of the Metropolitan area (as men now began to call it) was the city proper, a compact town, well organised and well governed. And all around it densely populated suburbs, which were treated as mere country villages; their only local authority was the parish vestry, and their only officers the churchwardens and the overseers. This state of things obviously could not continue long. First one parish and then another applied to Parliament

for an Act creating what was called a "select vestry," and many representative bodies were thus formed with diverse and very miscellaneous powers. As soon as Hobhouse's Act was passed in 1831, many London vestries adopted the Act, and became statutory select vestries. Later, most of these vestries were incorporated, and, where the parishes were small, instead of a select vestry, a district board was formed, under which several small parishes were grouped. And so in 1899, when the London Government Act was passed, there were 78 parishes and extra-parochial places within the Metropolis, but outside the City of London. Of these, 29 large single parishes were ruled by incorporated select vestries; Woolwich still retained its Local Board of Health; the remaining parishes and places were grouped into 12 districts and governed by 12 District Boards.

These vestries and boards were the sanitary authorities for their respective areas; they directed the removal of nuisances, and superintended the lighting, paving, watering, and cleansing of the streets. And each separate vestry or district board had its own little set of Acts, giving it special powers which other vestries and boards did not possess. Besides these there was a long series of general Acts which applied to the whole Metropolitan area. There were at least 120 of these. Chief among them are the Metropolitan Paving Act, 1817 (better known as Michael Angelo Taylor's Act), and the Metropolis Management Acts, 1855 to 1890, and the Public Health (London) Acts, 1891 and 1893. Then it was found necessary to create a central authority to deal with main drainage and other matters which affect the Metropolis as a whole or which concerned more than

one parish or district. And so in 1855 the Metropolitan Board of Works was formed. But its members were elected on a wrong principle by the various boards and vestries, and not by the ratepayers themselves. This absence of direct responsibility proved its ruin. There is a proverb, *De mortuis nil nisi bonum:* so I will say nothing about the Metropolitan Board of Works. And besides all these boards and vestries it was deemed necessary from time to time to create many minor authorities to meet various pressing needs. As the population of London outgrew its existing institutions, the defects and shortcomings were remedied by what I will venture to call patchwork legislation. No attempt was made to grapple with the problem of London government as a whole; but special authorities were created for special purposes and for special localities as occasion seemed to require. And so there arose the Metropolitan Asylums Board, the Thames Conservators, the Commissioners of Baths and Washhouses, the Commissioners of Free Libraries, the Burial Boards, etc., in addition to thirty Boards of Guardians, and the London School Board. Each new need was met by calling into existence a new authority which paid no heed to any of its predecessors, but pursued its own independent policy, appointed its own staff of salaried officers, and often levied its separate rate.

Every London ratepayer has therefore great reason to thank Mr. Ritchie and Mr. Balfour, for between them they rescued us from chaos. Mr. Ritchie brought in the Local Government Act of 1888, by which he created the administrative County of London, abolished the Metropolitan Board of Works, and transferred it powers and duties to the new London

County Council. Mr. Balfour brought in the London Government Act of 1899, by which he divided the whole of the county of London outside the city into 28 municipal boroughs, each governed by a Borough Council consisting of a Mayor, Aldermen and Councillors. Mr. Balfour by the same Act abolished some 127[1] minor local authorities, and transferred their powers and duties to the new Borough Councils.

This concentration of authorities is in itself a boon; as multiplicity of organisation invariably tends to needless expense and prevents efficient supervision and control. But the Act contains many other valuable provisions: it directs that the accounts of each of the new boroughs should be audited by a District Auditor appointed by the Local Government Board; it provides that so far as practicable all rates shall be collected together, and that the demand note shall state explicitly the amount required for each separate purpose of local government. It is a well-devised and well-drafted measure; it simplifies and improves the whole machinery of London government, and gives dignity and importance to civic work.

## LOCAL FINANCE.

But all this simplification and improvement will be of little use, unless the ratepayers begin to realise their own responsibility and to do their duty in the

[1] 73 Vestries, 12 District Boards, the Woolwich Local Board of Health (the last of its race), 12 Burial Boards, 19 Boards of Library Commissioners, and 10 Boards of Baths and Washhouses Commissioners, for all purposes of civic government, ceased to exist. The London County Council, the City Corporation, the Metropolitan Asylums Board, the boards of guardians, and the London School Board remain practically untouched.

matter. The most skilfully devised legislation will be of no avail if those for whose benefit it is devised take no interest in its administration. Everything depends upon the spirit in which these new laws are administered. And this again depends on the character of the men who are elected to office and on the amount of public interest taken in their work. Now that the whole machinery of local government, both in London and in the provinces, has been made so much simpler and clearer, is it too much to hope that the electors will rouse themselves from their apathy and begin to take an intelligent interest in their own local affairs? Surely the time has come when the general body of ratepayers should make some effort to understand how their money is spent and why so much is needed. In particular, they should learn who is responsible to them if this or that goes wrong, who is to blame if estimates are recklessly exceeded and the rates continue unnecessarily to increase. In the past they did nothing to prevent this steady increase. They grumbled, of course; Englishmen always do. But then they said, "It is no use crying over spilt milk"; a sentiment which, by the way, is not true when, as now, the councillors who spilt the milk have to stand on a platform and be "heckled" every third year. Anyhow, they did nothing; they never brought their representatives "to book"; and of course their representatives did not obtrude on their constituents accounts and figures for which they did not ask.

And what was the result?

I take the latest statistics which I can obtain from a perfectly reliable source,[1] and I find that in the year ending March 31st, 1898, our local authorities spent

[1] Report of the Local Government Board for 1899-1900.

no less than £84,873,744! That is the expenditure for local purposes in one year. To meet this outlay, £37,605,368 was raised by means of rates; £17,050,028 was defrayed out of moneys borrowed for the purpose; the Treasury contributed £10,972,839; the rest of the income of these local authorities was derived from fines, dues, tolls, etc. But I note that their total receipts do not balance their total expenditure. These bodies have spent more than a million pounds in excess of their income and their borrowings! The total amount raised by rates in England and Wales has increased in each of the last twelve years. In the financial year 1885-86 it was £26,142,891; in the financial year 1897-98 it was, as has just been stated, £37,605,368—an increase of almost one million pounds per annum. The rateable value of rateable property in England and Wales steadily increases; on Lady-Day, 1898, it was £168,664,993. But, in spite of this, the rate per pound steadily increases too. Taking an average all over England and Wales, it was, in round figures, in the year 1891-92, 3s. 8d.; in the year 1892-93, 3s. 10d.; in 1895-96, 4s. 5d.; in the year 1897-98, 4s. 9½d. in the pound. That is to say, the rate per pound increases, roughly, at the rate of 2½d. in the pound every year. And yet, at the same time, the out-standing debt of our local bodies grows at the same rapid pace — much faster than the rate at which we reduce the national debt. Since 1874 we have paid £134,510,053 off the national debt. But during the same period the local debt of England and Wales has been increased by £169,197,052. In 1875 it was £92,820,100; in 1881, £144,203,299; in 1892,

£207,524,093; in 1898, £262,017,152—£54,493,059 being thus added in six years, and £169,197,052 in twenty-three years. It is true that this debt must be paid off within periods of varying length—30, 40, or, it may be, 60 years. But new debts are constantly created which far outbalance any amount paid off. The sad facts remain that the expenditure of our local authorities steadily increases; the amount of the rates we pay steadily increases; and at the same time the permanent outstanding debt of our local authorities steadily increases.

How can this be checked?

In the first place, the accounts of every public authority should be audited by a district auditor, a skilled man appointed by the Local Government Board, and not by so-called "elective auditors," who have, as a rule, no professional training as auditors, and no legal knowledge which would enable them to decide which items of expenditure are legitimate and which are not.

In the next place the ratepayers should insist that every local authority should every year prepare and publish a budget—a detailed estimate, that is, of its probable income and its probable expenditure during the coming year. Many of our vestries had such estimates prepared, but they did not publish them; at least, the ratepayers never got them. Then at the close of the year every authority should prepare and publish a detailed account of the actual receipts and the actual expenditure of the year. Every ratepayer should be able at any reasonable time to obtain a copy of both statements without difficulty. The accounts should be stated clearly in a simple form that will be readily intelligible to those who provide

the money which the local authority expends. And the ratepayers should make a point of obtaining these two statements of account, and of comparing the estimated with the actual expenditure; and if they find (as they probably will) a marked difference between the two, they should ask the reason why, and, what is more, insist on having a clear answer to the question.

In these ways the enormous sum spent annually for local purposes may possibly be somewhat reduced. And in particular the attention of the ratepayers should be directed to the cost of our paupers. During the year ending Lady Day, 1899, the amount spent on out-relief was larger than in any of the 23 preceding years, while the expenditure on in-maintenance was greater than in any of the 42 years preceding! As many as 807,595 persons were in receipt of poor-relief, indoor and out, on January 1st, 1900, and of these 99,720 were *adult able-bodied* paupers.[1] Some steps should surely be taken, by means of emigration, home colonies, or in some other way, to reduce the amount of pauperism in this country.

Well now, I have taken you a hurried scamper across the field of local government and domestic legislation. And have you not the feeling, as we return home, that somehow or other we are a little too much governed nowadays? Certainly we are more governed than our grandfathers were. I am far from saying that it is not very good for us: these various councils, and the central authorities which control them, have done an enormous amount of very useful work. But there was a boy at my school who was asked to write a life of Nelson; and

[1] Report of the Local Government Board, 1899-1900, p. lxx.

he wrote a beautiful and touching account of the great admiral's exploits, and ended thus: "His last words were, 'Every man expects England to do his duty!'" Is there not among us a little too much of the spirit thus falsely ascribed to Nelson? Does not every man now expect the State to do his duty for him? There was an inquest held a fortnight ago on the body of a man who had been killed by a boiler explosion. And the jury found a special verdict, exonerating everybody concerned from all blame in the matter, but strongly urging that the State should appoint officials who would regularly inspect all boilers. Do not you think that Nelson would have considered that it was the duty of that employer to inspect his own boiler himself and discover how thin it was before it burst and killed his servant. Are there not enough inspectors, enough officials? Are we always to rely on the State to do our work for us? I cannot conclude better than by citing a passage from an excellent little book, written by my friend, Mr. Chalmers, in 1883: "In the case of local bodies, as in the case of individuals, it may be better and healthier to be too little governed than to be too much governed, even though the government be good."[1]

[1] *Chalmers on Local Government*, p. 159.

W. Blake Odgers.

## VI.

# CHANGES IN EQUITY, PROCEDURE, AND PRINCIPLES.

(Thursday, December 13th, 1900.)

I AM old enough to remember hearing some of the ablest leaders of the Chancery Bar argue very difficult cases within these walls; but I do not think any one of them ever had entrusted to him a more hopeless task than to compress within the limits, the very proper limits, of one hour, an intelligible account of the changes that have been gradually wrought in the procedure of Chancery during the century now so near its last gasp.

Were I in search of a motto for my discourse I should hesitate long between the Virgilian line:

*Infandum, Regina, jubes renovare dolorem,*

and the Shakespearean line:

"*To weep afresh a long since cancelled woe.*"

The things that have disappeared from our jurisprudence during this century, "unwept, unhonoured," and until these lectures "unsung," would if listed as motions used to be towards the end of a term, easily engirdle all the Four Inns of Court.

The 31st day of December, 1834, was perhaps the last day of the old Common Law learning, but much of that old learning was already obsolete, for there were, I am sure, many barristers then enjoying good practices in the Temple who could not have told you off-hand all the distinctions between writs of entry *sur disseisin*, in the *quibus*, in the *per*, in the *per* and *cui*, and in the *post*.

This can hardly be said of the changes wrought in Chancery, for not only have those changes been radical and revolutionary, not only have they made an end of the old High Court and of her peculiar procedure, but they were effected and came into operation when the High Court of Chancery, though reformed, was still in the full tide of existence.

The distinction between Law and Equity is one which will never be grasped by the lay mind. This need not trouble us. It was a relief to a litigant in the old Queen's Bench who had lost his case to be able to exclaim as he left Westminster Hall, "This may be law, but it is not equity," whilst the disappointed Chancery suitor, who had been refused the relief he had prayed, could always ejaculate "If this be equity, give me law."

We of course know how it chanced that these two rival systems were riveted upon us. It was easy for Voltaire, in days before the historical method was pursued, to imagine all the scandals and abuses of legal procedure being deliberately invented and called into being at a hellish conclave of corrupt lawyers, bent upon making their fortunes at the expense of the public. The study of history has made an end of all these original contracts, deliberate councils, and gravely concocted frauds; and we now

know how the Forum of Common Law and the Forum of Equity came to be separated in this country, and we can see for ourselves how easily it might have happened otherwise.

As soon as actions were begun by original writs, it was *from* the Office of the Chancery that these writs issued, and it was *in* that office they were prepared by the Chancellor and his clerks, to whom was entrusted, in the words of *Fleta*, the task of hearing and examining the petitions and complaints of plaintiffs, and giving them a remedy according to the nature of the injuries shown by them.

Once the appropriate writ was issued the Chancery lost control over the subsequent proceedings ; and all questions upon the validity of the writ, and upon the pleadings it gave rise to, were determined by the judges of the Courts of Law. Had the Chancellor been strong enough to issue what writs he thought fit, and had those writs been free from the criticism of the judges upon their validity, all cases as they arose might have gone to trial before the same courts.

But it is the natural course in things judicial for a procedure to stiffen as in an arctic frost ; and the writs which the clerks of the Chancery were accustomed to prepare and issue, although numerous enough, became classified and rigid.

By the Statute 13 Edw. I. called Westminster II. which Lord Coke considered as declaratory only, it was enacted that "whensoever from henceforth it shall fortune in Chancery that in one case a writ is found and (*in consimili casu*) falling under like law and requiring like remedy *is found none*, the clerks of the Chancery shall agree in making the writ or the plaintiffs may adjourn it to the next Parliament."

By this enactment Actions on the Case, as they were called, became possible, and the Action of Trespass on the Case came into very general use.

This liberty to the Chancery afforded an opportunity which, if it had been taken advantage of, might have avoided two rival jurisdictions, and in truth an attempt was once made to induce the Courts of Law to entertain an action on the case for damages against trustees of real and personal estate who neglected or refused to perform their trusts; but as the attempt was not made until the jurisdiction of the Court of Chancery for enforcing the actual performance of trusts was well established, it was considered fit that the Courts of Law should not interfere in such cases, but leave them to the Courts of Equity.

What happened seemed then to have been this. Writs whether strictly original or on the case were issued from the Chancery and gave rise to proceedings at Common Law; but were there no writs suitable to meet the cases presented to the Chancery by way of petition or complaint, it was then open to the Chancellor and his clerks, if they found or thought that the Common Law was deficient, to issue their own *subpœna* and to reserve the case for hearing by the King in Council. It was out of this *reservation* that the extraordinary jurisdiction of the Court of Chancery arose.

The subsequent invention of Uses and the appearance of Trusts, coupled with civil dissensions and the ambition of clerical Chancellors, sufficiently account for the existence of the High Court of Chancery without the invocation of any superhumanly endowed and deliberately malicious councils of lawyers.

I turn now to the Procedure in Chancery as it

existed in 1801, when Eldon was Chancellor and Sir William Grant Master of the Rolls; for it was not till 1815 that the first Vice-Chancellor of England appeared in the person of Sir Thomas Plumer.

Chancery proceedings were initiated by Bills which were of three kinds : Original Bills, Bills not original, and Bills in the nature of Original Bills though occasioned by former Bills. I will content myself with the Original Bill, praying a decree of the Court touching some right claimed by the person exhibiting the Bill, in opposition to rights claimed by the person against whom the Bill was exhibited.

This Bill was in writing and engrossed on parchment. It was divided into nine parts. The first part contained the address of the Bill to the person holding the Great Seal for the time being. The second part contained the names of the parties—complainants and defendants. The third part, which was all that was ever necessary, contained the case of the plaintiff, and was commonly called the stating part of the Bill. The fourth part contained a general charge of confederacy against the persons complained of. The fifth part, commonly called the "charging" part, contained allegations as to what defences the defendants were likely to set up, and charging the matters which might be useful in avoiding those defences. The value of this charging part was that it enabled the plaintiff, by means of interrogatories founded upon the charges, to obtain a discovery of the nature of the defendant's case. The sixth part gave jurisdiction to the Court by a general averment that the acts complained of were contrary to equity, and tended to the injury of the complainant, who was with-

out a remedy or a complete remedy save but for the assistance of the Court. The seventh part consisted of Interrogatories addressed to the defendants which had to be answered upon oath. The eighth part contained the prayer for relief, and the ninth part prayed that process might issue.

It was a Bill of this kind which, when it was served upon John Wesley in 1745, drew from him the following observations. "I called on the Solicitor I had employed in the suit lately commenced against me in Chancery, and here I first saw that foul monster, a Chancery Bill. A scroll it was of 42 pages in large folio to tell a story which needed not to have taken up forty lines, and stuffed with such stupid senseless improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any Heathen Court either of Greece or Rome, and this is equity in a Christian country."

Fifty years later, Jeremy Bentham, who had been bred in an attorney's office, was content to call an Original Bill "a volume of notorious lies." The orthodox professional view of a Bill may be found soberly stated in the once classic pages of Lord Redesdale's Treatise on Pleading. After stating the nine parts of a Bill he adds "some of them are not essential and particularly it is in the discretion of the pleader to allege any pretence of the defendant in opposition to the plaintiff's claims or to interrogate the plaintiff specially. The indiscriminate use of these parts of a Bill in all cases has given rise to a common reproach to practitioners in this line that every Bill contains the same story three times told. In the hurry of business it may be difficult to avoid giving ground for the reproach, but in a Bill pre-

pared with attention the parts will be found to be perfectly distinct, and to have their separate and necessary operation."

I confess my sympathies are with the Reverend John Wesley. Nobody likes having roguery attributed to him even though it be "common form." Thus an ordinary Bill to foreclose a mortgage more frequently than not contained allegations of this kind.

> But now so it is, may it please your lordship, that the said C. combining and confederating with divers other persons to your Oratrix unknown (whose names when discovered your Oratrix prays may be inserted in this her Bill with apt words to charge them) how to defeat and defraud your Oratrix of the said money due upon the said mortgage or of the mortgaged premises that so they may share and divide the same amongst themselves doth sometimes pretend and give out in speeches that he had conveyed the said premises to some other person or persons for a valuable consideration and thereby made an absolute sale of the same before they were mortgaged, and at other times he doth pretend and give out in speeches that he had mortgaged the same before and had only the Equity of Redemption in him at the time when he mortgaged the same to your Oratrix, and that, therefore, your Oratrix must pay off the prior mortgage, and at other times the said C. doth pretend and give out in speeches that he hath confessed Judgments, Statutes, and Recognizances to divers persons to whom the said premises are liable, and made other secret conveyances and otherwise incumbered the

premises, and yet conceals the names of the person or persons to whom he hath so sold or mortgaged the same, and to whom he hath confessed such Judgments, Statutes, and Recognizances, so that your Oratrix knows not how to proceed at law to recover the possession of the premises. All which pretences and doings of the said C. are contrary to Equity and good Conscience. In tender consideration whereof, and for as much as your Oratrix hath no way or means whereby to discover what incumbrances there are upon the said mortgaged premises, and to which they are liable nor to foreclose the Equity of Redemption against the said C. or his Vendees or Mortgagees in case any be but in a Court of Equity, and the rather for that your Oratrix's witnesses are either dead beyond the seas or in places remote and to your Oratrix unknown. To the end, therefore, etc., etc.

To a Bill of this kind a sworn Answer had to be put in by the defendant unless indeed he preferred to disclaim, to plead, or to demur. There were nine recognised grounds of demurrer and fourteen good pleas, but I pass them over, as in the hands of a skilful pleader a Bill could almost always be so framed as to make a plea or a demurrer well-nigh impossible.

An Answer began by reserving to the defendant all advantages which he might have taken by exception to the Bill, that is to say, by way of demurrer or plea. It was then usual for the defendant to state his case such as it was, and then, after denying the unlawful confederacy, to add, by way of conclusion, a general traverse or denial of all the matters in the

Bill. Thus, assuming there was an interrogatory in the Bill as follows: "Whether the said A. B. did not on or about the 1st of January, 1836, duly execute an Indenture of such date purport and effect as aforesaid so far as the same is hereinbefore set forth or of some and what other date purport or effect." If the defendant had (as was probably the case) executed such a deed, he said so in the stating part of his Answer, but when he came to answer the Interrogatory he usually was made to swear something like this: "And this defendant says he cannot *save as aforesaid* set forth as to his knowledge or belief whether on or about the 1st of January, 1836, the said A. B. duly executed an Indenture of such date purport or effect as in the said Bill mentioned so far as the same is therein set forth, or of any other date purport or effect."

The answer once put in, it was open to the plaintiff, if he conceived it to be insufficient, to take exception to it, and to require further and fuller answers. In an old edition of *Daniel's Practice*, I notice that thirty-five closely printed pages state the practice as to exceptions. If however, and when, the plaintiff was satisfied with the defendant's answer, he filed a Replication to it, which was either a merely general denial of the truth of the plea or answer, or specially replied to new matter set forth in the answer. A special replication of this kind required a Rejoinder, and so on till at last issue was joined.

Stopping here, an important observation has to be made. By adopting the Chancery procedure a plaintiff could obtain from a defendant a statement on oath as to the truth or falsehood of the plaintiff's allegations.

At the time we are speaking of, this was absolutely impossible at common law. Here was a great and vital distinction between the two jurisdictions.

This privilege established a process known to the Chancery practitioner of those days as "scraping the defendant's conscience." That is to say, you filed your Bill against a man alleging what you chose and compelling him to answer, and punishing him with repeated exceptions for insufficiency and motions in open court if he did not fully answer, a mass of interrogatories having for their object a complete discovery of his actual position. He had to put in an answer on oath, and such answer admitted, it may be, some of your alleged facts and disputed others, and thus threw light upon the real truth of the case. You then amended your Bill upon the information which had been thus supplied you by your opponent and interrogated him afresh, getting each time a little bit nearer the point. So on you might go until at at last the defendant was compelled either to lie or to make some admission which entitled you to relief. A once well-known London solicitor gave the following evidence before the celebrated Chancery Commission which was held in the year 1826.

"It frequently happens that it is necessary to scrape the defendant's conscience by continuing to amend the Bill. I have amended a Bill against one of the first merchants in the City of London three times in one of the plainest cases that ever was. At last he could not evade the questions put to him, and paid my client the £1000 in dispute." I wonder whether he paid the costs of the scraping as well.

This privilege of scraping a defendant's conscience and of obtaining discovery on oath, were two most

important privileges in days when the parties to an action at law were not admissible witnesses.

But we must be careful not to suppose that the conscience-scraping privilege was more extensive in its scope than in fact it was.

Until 1843 a plaintiff in Chancery could go no further than put the defendant to his oath, *i.e.* he could compel him to answer interrogatories unless, indeed, the defendant had successfully pleaded or demurred to the Bill. But if the defendant's conscience was tough enough and he swore up to the mark and made no fatal admissions, the plaintiff was baffled, for he could not cross-examine the defendant on his answer or call him as a witness. He had therefore to dismiss the Bill unless he could make good its allegations by the testimony of independent and competent witnesses. The only way open to a defendant to retaliate upon a plaintiff was by way of Cross-Bill.

In 1843[1] it was enacted that in Courts of Equity any defendant to any case might be examined as a witness on behalf of the plaintiff or of any co-defendant.

The reason why the testimony of parties to litigation was excluded was the horror felt or alleged to be felt by the canon law of the sin of perjury. It was thought wrong to give a litigant the choice of winning an action at the price of his soul. In a court of common law you could not ask your opponent anything or tell your own tale yourself. In a Court of Equity you could put the defendant upon his oath, but you must rest content with his answer. It all seems very absurd, and indeed was

[1] 6 and 7 Vict. 85, s. 1.

very absurd; but it cannot be denied that, since the alteration in the law, perjury has enormously increased, and I own to having experienced much horror in noticing with what terrible frequency in Chancery actions the only questions the judge has to decide is whether the plaintiff or the defendant is a perjurer; and nowadays the penalty for perjury in a civil action is the payment of the costs of the proceedings in the course of which it is committed.

Let me now ask you to proceed a step further and to recall how in the old Court of Chancery the evidence of such witnesses as were permissible was taken. One almost naturally replies, "Oh! by affidavit." But such an answer would be incorrect. Trial by affidavit is younger even than I am, for it did not come into being till 1852. Before that date—an important date in the history of the Court of Chancery—the only evidence (except the proof in certain cases of written documents) admitted on the hearing of a cause consisted of depositions taken upon interrogatories before the Examiner of the Court or before Commissioners in the Country. The Examiner and the Commissioners were sworn to secrecy, and the interrogatories, which had to be signed by counsel, were all prepared beforehand and put one after the other to the witness by the Examiner in the absence of counsel and of the parties. The result of the examination was unknown until the publication of the depositions, when copies were delivered out of the office to all the parties.

Only consider the task of a counsel who had to prepare interrogatories for examining a witness of whose character or disposition to tell the truth, he

could know but little, and whom he was never destined to see in the flesh. He was not in theory allowed to put leading questions, and he, therefore, had to cast them in a very general form easily liable to be misunderstood both by the Examiner and the witness. "However wide," said Mr. Plumer, one of the old Examiners to the Court of Chancery, "the interrogatory is of the real facts the Examiner cannot vary it to meet them, whilst sometimes it is so cramped that the statement of the witness cannot be admitted under it, and sometimes it is so vague that the point inquired after is not made out, and an indefinite and indistinct answer is the result."

Owing to the difficulty of knowing what the witness would say when examined in private on interrogatories, the number of witnesses and the number of interrogatories were greatly multiplied, and the cases were overloaded with evidence for the most part wholly immaterial.

Vice-Chancellor Shadwell, in giving his evidence before the Commission of 1824, when asked: "In point of fact, in your experience have you not found that a great deal of trash comes out in the shape of evidence in the Examiner's Office?" replied, "A monstrous quantity." He afterwards described it as "a monstrous quantity of trash and a great deal of stuff"; none the less the suitor had to take office copies of the whole of the depositions and to furnish his counsel in his brief with copies of those copies.

Theoretically there was a right to cross-examine, but as this cross-examination had also to be taken by way of answer to written questions, which were prepared by counsel before the completion of the evidence in chief, and without his knowing what that

evidence in chief was, it was never the practice of counsel to cross-examine at all unless they knew that the witness was in reality a friendly one. What good could come of it? The cross-examiner did not see the interrogatories proposed by his opponent, much less the depositions in chief. He had no means of knowing, though he might guess, on what points his adversary's witness had been examined. He had no opportunity, after putting one question in cross-examination, of knowing the answer and of following up his question, whilst, of course, the demeanour of the witness was a sealed book to him and to the judge, to whom the evidence thus taken was supposed to be submitted.

This mode of taking evidence continued until the year 1852, when, by 15 and 16 Vic. c. 86, sec. 28, it was abolished, and by sec. 29 a plaintiff was empowered to give notice to the defendant that the evidence of the case should be taken either orally or upon affidavit, and here unfortunately the Act proceeded to provide that if witnesses were examined orally they should be so examined by or before one of the Examiners of the Court, or before the Examiner to be specially appointed by the Court. The Act provided that the Examiner should be provided with a copy of the Bill and Answer, and that such examination should take place in the presence of the parties, their counsel, solicitors, or agents, and that the witnesses so examined orally should be subject to cross-examination and re-examination.

This doubtless was a considerable improvement, but those of us who are old enough to remember this practice will not be disposed to speak enthusiastically of its merits, and, as a rule, the parties were

content to agree that the evidence in Chancery actions should be taken upon affidavit. The witnesses who had made affidavits were subject to be cross-examined and re-examined upon the contents of those affidavits, but such cross-examination and re-examination took place before an Examiner much after the old fashion (15 and 16 Vic. c. 86, s. xxxviii.).

The year 1852 may fairly be taken as an epoch in the history of the old Court of Chancery. After 1852 it was a reformed Court. The Act of that year introduced many useful reforms. It abolished the practice of engrossing Bills on parchment and substituted printed Bills, it at least endeavoured to get rid of prolixity in pleadings, it simplified procedure in many ways too numerous to mention, and particularly as to objections for want of parties, and it took the first step towards the union of the jurisdictions by giving the Court of Chancery full power to determine any question of law which in the judgment of the Court it was necessary to decide previously to the decision of the equitable question at issue between the parties, and it declared it no longer lawful to the Court of Chancery to direct a case to be stated for the opinion of any Court of Common Law.

Against the old Court of Chancery as it existed in all its glory prior to 1852 the complaint was threefold —*Expense*, *Delay*, and *Vexation*. In order to estimate the truth and full force of these fateful words it is necessary to cast a frightened eye over the two immense folio volumes containing between 1300 and 1400 closely printed pages which represent the evidence taken before the Chancery Commission of 1824. Experts of the innermost circles, counsel in great practice, solicitors of the highest standing all came

before the Commission, and according to their kind and each after his own fashion told his story.

As to *Expense*—I will mention one out of a hundred prominent sources of an enormous expenditure—the payment for copies of proceedings in the Master's Office. All documents and papers which in the course of the proceedings had to be submitted by any of the parties to the Master were copied by his clerks and furnished to each of the other parties whether they wanted them or not, at at least three times the ordinary charges for copying. Not to take copies or to shirk your copies was to incur the dangerous enmity of the office. The cost of prolonged proceedings became enormous and chiefly by the heaping up of reams and reams of irrelevant matter. But even where proceedings were not very prolonged the costs were huge. Mr. Wellesley, who was very properly deprived of the custody of his children by Lord Eldon, stated that his costs amounted to over £5000, and yet Lord Eldon had only taken eighteen months to decide the point.

As for *Delay*, Mr. Vizard, a leading solicitor of his time, told the Commission that after he had filed a Client's Answer he could not make the Plaintiff move again for nine months, and that if Notice of Appeal were given to the Lord Chancellor from a decree of the Vice-Chancellor he should consider the case locked up for five years, whilst petitions and motions waited months for a hearing.

So much for Expense and Delay. *Vexation* may be safely presumed.

In the pages of our immortal Dickens posterity will find recorded the only permanent memory of a departed system. Nobody who has read the two

folio volumes I have already referred to, nobody who has read *Parkes' History of the Court of Chancery*, can deny the essential truth of *Jarndyce* v. *Jarndyce*.

"'Mr. Tangle,' says the Lord High Chancellor, latterly something restless under the eloquence of that learned gentleman.

"'M'lud?' says Mr. Tangle. Mr. Tangle knows more of Jarndyce and Jarndyce than anybody. He is famous for it—supposed never to have read anything else since he left school.

"'Have you nearly concluded your argument?'

"'M'lud, no—variety of points—feel it my duty t'submit—ludship,' is the reply that slides out of Mr. Tangle.

"'Several members of the bar are still to be heard, I believe?' says the Chancellor, with a slight smile.

"Eighteen of Mr. Tangle's learned friends, each armed with a little summary of eighteen hundred sheets bob up like eighteen hammers in a pianoforte, make eighteen bows and drop into their eighteen places of security.

"'We will proceed with the hearing on Wednesday fortnight,' says the Chancellor.

. . . . . .

"This is the Court of Chancery which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart that

there is not an honourable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you rather than come here.'"

When Dickens wrote these last words he doubtless had in his mind the public statement which Lord Lyndhurst whilst Lord Chancellor made in the House of Lords, "There is no doubt that parties only come to the Court of Chancery when dire necessity compels them to do so." But, with deference to Lord Lyndhurst, the worst thing about the Court of Chancery was not so much the direful case of those who went to it of their own accord but the still more direful case of those who were put there against their will by reckless suitors and unprincipled practitioners.

The old Court of Chancery, as I have already said, was substantially reformed in the year 1852, but it still continued, though in a modified form, its peculiar practice until *The Judicature Act*, 1873, which united and consolidated the High Court of Chancery, the Court of Queen's Bench, Court of Common Pleas, Court of Exchequer, High Court of Admiralty, Court of Probate, and the Court for Divorce and Matrimonial Causes, into one Supreme Court of Judicature in England, and provided that in every civil cause or matter commenced in the High Court law and equity should be administered by the High Court and Court of Appeal according to certain rules, which in effect gave both plaintiffs and defendants the benefit of any relief to which they would have been entitled, either by way of claim or defence, in the Court of Chancery, and enabled the High Court and the Court of Appeal to grant all such remedies whatsoever any parties thereto might appear to be entitled to in

respect of any and every legal or equitable claim properly brought forward by them respectively, so that all multiplicity of legal proceedings should be avoided.

By the same Act business of a certain kind which covered the extraordinary jurisdiction of the old Court of Chancery was assigned to the Chancery Division of the High Court. By this legislation the High Court of Chancery, as an independent Court, ceased to exist. Pleading was for the first time rigorously reformed; though whether pleadings as they now exist and are amended by leave of the Court at the trial are of much use is a point of controversy I need not touch on.

By the Rules of the Supreme Court, Order 37, the great and all-important reform for which Jeremy Bentham had contended during the early years of the century, namely, the substitution of public *viva voce* testimony for written evidence, was finally established. All Chancery practitioners since 1875 have done as best they might to extract the evidence they sought on behalf of their client's case from the mouth of the living witness, and whatever they might fail to obtain they left with much confidence to be elicited by their cross-examining brother. It would be absurd here to do more than mention those famous Orders 54 and 55, or to deal with the new practice relating to what is called an Originating Summons which enable any difficult point that may have arisen in the administration of a trust or the construction of a will to be determined by the Court at a cost which, when compared with the costs of a Chancery suit, even of a reformed Chancery suit, can only be pronounced trifling. It is now a feat of great

difficulty to obtain in the Chancery Division a general decree for the administration of the estate of a deceased person. In the days even subsequent to 1852 such decrees with all the costs they entailed were matters of daily occurence. The whole tone and attitude of the profession has been marvellously changed.

The old Chancery Procedure having been thus completely abolished, the old High Court having gone, the old Rolls Court where Sir William Grant and Sir George Jessel dignified and expounded the law, the old Rolls Chapel where Butler preached the wisest sermons ever preached by a divine of the Church of England or any other church, having all been ruthlessly destroyed, I turn away, cheerfully enough, I admit, to contemplate with pride and pleasure the far different future that remained in store for the principles of equity, of Equity Law, as Lord Esher used to call it. Like truth, equity has finally prevailed, and by statute. See 36 and 37 Vic. c. 66, sec. 25, sub-sec. (II.). "Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter the Rules of Equity shall prevail." "The Court," says Lord Cairns in *Pugh* v. *Heath*, 7 App. Cas. p. 237—"the Court is not now a Court of Law or a Court of Equity but a Court of complete Jurisdiction, and if there were a variance between what, before the Judicature Act, a Court of Law, and a Court of Equity would have done, the rule of the Court of Equity must now prevail."

No triumph can be completer than this. The judges of the Queen's Bench Division are by statute

required to administer, even though they may fail to understand, the Rules of Equity.

These Rules have undergone little change during the century, and were Lord Eldon to come to life again and survive the shock of having the Judicature Acts explained to him by Mr. Justice Wright, he would not find it difficult to decide an action for specific performance of a contract to buy or sell real estate ; or, (his attention being first directed by counsel to the Wills Act,) to construe a will ; or to dissolve a partnership ; or to redeem or foreclose a mortgage ; or to raise a portion ; or to rectify or set aside an instrument on the ground of fraud, accident, or mistake. In the matter of married women I should advise a somewhat prolonged reticence.

In considering this part of the subject one must distinguish between (1) the alteration of any Rule of Equity; (2) the development of a Rule of Equity; and (3) the case of a Rule of Equity becoming obsolete owing to statutory reforms.

I can only think of one important alteration in a Rule of Equity effected during the century, and that is the statutory alteration[1] which allows an express trustee in the absence of fraud to plead the Statute of Limitations against his beneficiaries. Such decisions as *Re Swain*, 1891, 3 Ch. 233, *Re Page*, 1893, 1 Ch. 304, and *Re Somerset*, 1894, 1 Ch. 231, would have startled the Lord Justice Turner almost as much as they would Lord Eldon. No such change could of course have been wrought but by statute. It is one of the most significant reforms of our time.

As an instance of the development of an equitable doctrine I may cite that which has recently taken

[1] The Trustee Act, 1888, s. 8.

place with regard to what the old Court of Chancery used to call harsh and unconscionable bargains.

Both at Common Law and in Equity, fraud—that is cheating—has, when proved, always been sufficient (subject to the necessity of seeking relief within a reasonable time, and to the rights of innocent parties) to upset the transaction tainted with it. Fraud both at common law and in equity has always included active imposition, and also any bargain such as, in the words of Lord Hardwicke in *Chesterfield* v. *Janssen*, "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." The Court of Chancery, however, went further than this, and granted relief against contracts when satisfied that owing to the circumstances and conditions of the contracting parties surreptitious advantage had been taken by one party over the other; and also in the special cases of heirs, reversioners, or expectants the Court of Chancery was accustomed, whether there was cheating or not, when a reversion had been sold or mortgaged, to alter the terms of the original contract if it appeared that such terms were intrinsically unconscionable and to substitute other terms which in its opinion met the fairness of the case.

The distinction therefore was that if you were dealing with property in possession, a contract of sale or loan would not be set aside unless *fraud*—that is, imposition, which in equity (and probably at law) included surreptitious advantage—was clearly proved, as proved it might be by the evidence of witnesses or by the transaction itself. In the case, however, of reversioners, dealing with their expectancies, fraud and imposition need not be proved. In the leading case

upon the subject, *Chesterfield* v. *Janssen*, Mr. Spencer was thirty years of age, possessed of a great estate of his own, and in the opinion of several of the witnesses a man of good sense and, as the phrase then ran, "of parts." He had not been cheated, but he *was* a Reversioner.

The rate of interest required by the original contract was not necessarily a relevant fact, unless indeed it was of so enormous a character as to be in itself proof of fraud. Consequently the repeal of the Usury laws did not affect the principles of the Court, which looked at the whole transaction, and, if satisfied that the contract was fraudently obtained, set it aside, whether the property was in possession or reversion, whilst in the case of a reversioner or expectant heir, the Court would set aside the contract and create fresh terms without evidence of fraud, if in its opinion the original terms were harsh and unconscionable. Sir Geo. Jessel, in *Beynon* v. *Cook* (decided 1875) brought out these principles with his accustomed clearness. "The doctrine," as to dealing with a reversioner "has," he said, "nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain sets it aside." On the other hand, in the course of his judgment Sir George Jessel observed, "The usury laws no longer being in force, persons may make hard bargains with persons entitled to property in possession or entitled to no property at all."

In 1880 it was decided in the Chancery Division, no doubt by a Common Law judge, in the case of

*Nevill* v. *Snelling*, that the principle on which the Court of Equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner, for the loan of money, applies also to the case of money being lent without security on unconscionable terms to a young man who had no property of his own and no expectation of any, except that his father was a peer possessing large property. It appears, however, from the evidence that the borrower did not fully understand the terms upon which he was borrowing the money, and that the lender knew that he lacked such understanding, and it was also found that the money was lent in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. Whether this case can be supported on the ground that the transaction was attended with fraud, or whether it must rest upon an extension of the principle of a reversioner to that of anybody whose father is in a position to leave him money, is perhaps doubtful. But by the recent Money-lenders Act (63 and 64 Vic. c. 51) the equitable doctrine as to harsh and unconscionable transactions has been greatly extended, and now in any proceedings taken in any court by a money-lender (coming within the definition of the Act) for the recovery of any money lent, or the enforcement of any agreement or security taken and held by them, the Court, if satisfied on evidence that the interest charged was excessive or that the amount charged for expenses, enquiries, fines, etc., were excessive, and that in either case the transaction was harsh and unconscionable, or was otherwise such that a Court of Equity would give relief, may re-open the transaction and take an account between the

money-lender and the person sued, notwithstanding settled accounts, and may adjudge such sum as the Court may, having regard to the risk and all the circumstances, think to be reasonable, and may set aside either wholly or in part, or replace or alter any security given or agreement made in respect of money lent by the money-lender. It should, however, be added that pawn-brokers, corporate bodies, and bankers are not money-lenders within the meaning of this Act. It is, however, a remarkable instance of the Legislature adopting—no doubt on very imperfect information—an equitable doctrine, and giving it a statutory application to a host of transactions to which otherwise it would have had no reference.

As an instance of a whole branch of equity being as it were cut off and dissevered from the main trunk by statutory reforms, it will be enough to mention the extraordinary jurisdiction of the old Court of Chancery in regard to the property of married women, her separate estate, her reversionary interests, and her equity to a settlement.

These principles are not indeed dead, but they are dying around us every day like unwatered plants. In the old Court of Equity a wife could always sue her husband, and be sued by him, pre-nuptial contracts could always be enforced in equity after marriage, and not only pre-nuptial contracts but post-nuptial contracts between a husband and wife entered into in good faith, and, with reference to the wife's separate estate, could be, and frequently were, enforced in equity. All this, of course, is in the very teeth of the common law doctrine of the essential unity of man and wife. The Statute of 45 and 46 Vic. c. 75, commonly called

The Married Women's Property Act, 1882, has wrought perhaps the greatest social revolution of the century. A married woman is now capable of acquiring, holding, and disposing, by will or otherwise, in life, or upon death, of any property belonging to her separately without the intervention of any trustee, and every woman married after the Act is entitled to hold as her separate estate all property belonging to her when she married or acquired by her after marriage. A stupendous change about which I need scarcely say the electorate was never consulted.

Though the reforms of our old Chancery procedure came with heart-rending slowness, come at last they have, whilst the rooted principles of the Court have never ceased to be courageously applied and usefully extended.

The future of our Jurisprudence lies largely on the knees of the Legislature. Fictions have played their part. Judge-made Law has played its part. To Statute Law belongs the future. Let us pray for well-drawn statutes.

AUGUSTINE BIRRELL.

## VII.

# CHANGES IN PROCEDURE AND IN THE LAW OF EVIDENCE.

(Thursday, January 17th, 1901.)

### *Adjective Law.*

THE lectures of this course delivered last term dealt mainly with substantive rights and wrongs. My duty to-night is to deal with the procedure by which rights are enforced and wrongs redressed. This branch of law is often called adjective law; possibly because of the numerous abusive epithets hurled at it by disappointed suitors.

A State, as you know, is a nation which governs itself, and it governs itself by means of laws. And a law, as you know, is a rule of conduct which the State prescribes and enforces. It is prescribed by substantive law, and enforced by adjective law. In other words, substantive law deals with *rights* and *duties*, adjective law with *remedies*.

It is perhaps a misfortune that in nearly every modern State the law is laid down adjectively rather than substantively; that is to say, the remedy can be ascertained more readily and easily than the

ecise nature and extent of the right infringed. In an ideal *corpus juris* each right should first be defined, and clearly and accurately defined, and then the remedy should follow as a corollary.

Yet adjective law has its value and importance. The wisest measure conferring rights or imposing duties will be inoperative, if no adequate remedy be provided in case those rights are violated or those duties neglected. A defect in the machinery by which an Act is to be enforced will often render that Act a dead letter.

Often, too, what purports to be only a change in procedure really effects a change in substantive law. An old remedy is extended to cover new cases; a new remedy is created which did not exist before; or a new ground of defence permitted to an inequitable claim; in each case the substantive law is altered. When the praetor first allowed an *exceptio doli*, when the clerks of the Chancery first issued writs *in consimili casu*, they were really altering and extending the existing substantive law.

Take, for instance, Mr. Fox's Libel Act, which was passed in 1792. It purported to make only a technical change in procedure; it merely said that a certain question, whether a writing was or was not a libel, should be answered by the jury and not by the judge. And yet this change in procedure, which sounds so highly technical, has had a widespread and most beneficial effect; for it established on a permanent basis the liberty of the press.

Or, again, as we are dealing with libels, take Lord Campbell's Libel Act of 1843. Up to that time it had been the rule in criminal cases that "the greater the truth, the greater the libel." There was some

sense in this maxim; it meant that the truer the charge was, the more likely it was to stir up angry feelings and to provoke a breach of the peace; and that, as you know, is the very thing which it is the object of criminal proceedings for libel to prevent. But this result followed, that a man could be prosecuted, fined, and imprisoned for publishing what was literally true. In civil proceedings the maxim did not apply; the truth of the words was always a perfect answer to any claim for damages; no plaintiff could recover compensation for injury to a reputation to which he had no right. But in criminal proceedings the rule was always different. The defendant was never allowed before 1843 to plead that his words were true. Yet there are many occasions on which it is right and necessary that the truth should be spoken, and fully and fearlessly spoken, even though someone's reputation may be injured thereby. There are other occasions on which to rake up some ancient scandal and give it publicity is a cruel and malicious act which can benefit nobody, even though the words be true. Hence Lord Campbell's Libel Act very sensibly provides that the truth shall be a defence to criminal as well as civil proceedings, whenever it is for the public benefit that the truth should be made known.

And in the same Act there is another minute change in procedure which has proved most beneficial to newspaper proprietors. Till 1843 the defendant in a civil action for libel could not pay money into court or plead that he had already apologised to the plaintiff. Sections 2 and 3 of the same Act of 1843 empowered the editor or proprietor of a newspaper to plead that he had before action or at the earliest opportunity afterwards apologised to the plaintiff, and

also enabled him to make amends by paying money into court.

These are all instances in which changes of procedure, apparently of a merely technical nature, have operated most beneficially, and have really changed the substantive law of the land.

### *Law and Equity in* 1800.

In the year 1800 the Courts of Common Law were entirely distinct and separate from the Court of Chancery; and, what is more, there were three Superior Courts of Common Law quite distinct and separate from each other. It is difficult for us, now that the superior tribunals of the country have for a quarter of a century been fused into one Supreme Court, to remember that till the year 1875 two systems of judicature flourished side by side, one at Westminster and one at Lincoln's Inn, which were in many respects at variance with each other. No doubt to some extent there is an essential difference between the subject-matter of an action at law and that of a suit in equity; and this difference has not disappeared, and never can disappear; nor is it perhaps desirable that it should. The verdict of a jury in a common law action decides a question of fact once and for ever. But a decree in Chancery leaves numerous accounts to be taken, enquiries to be made, and assets to be collected and distributed among the persons entitled to them; a long and minute investigation of complicated details is necessary, which can only be made in chambers, not in open Court. This difference is inherent in the subject-matter, and it necessarily involves some differ-

ence of procedure. Of this no one can reasonably complain.

But things were very different in the year 1800. Then what was right at law was wrong in equity. Judgment would be given on the same facts for the plaintiff in Westminster Hall, for the defendant at Lincoln's Inn. The common law refused to recognise claims and defences which a court of equity allowed. A plaintiff who succeeded at law was frequently restrained by an injunction issuing out of the Court of Chancery from enforcing the judgment which he had obtained at law. And even where there was no such sharp distinction on the substantive merits of the case, there were many pitfalls for an unwary suitor in the matter of procedure. To which was he to apply for redress, to a court of equity or to a court of law? If he sued in equity when he might have obtained redress at law, his bill was dismissed. If he sued at law when he should have filed a bill in equity, he was non-suited.

The Court of Chancery had originally been designed to correct the evils that flowed from the too great strictness and technicality of the common law. It was supposed to administer a code of morals rather than strict law, and to give redress to suitors in cases beyond the reach and outside the jurisdiction of the courts of common law. And so at first it did. But by the year 1800 it had become more technical, if that were possible, than the courts of common law themselves; its procedure had become more rigid; it would only grant relief in certain specified cases. However strong the moral claim of a plaintiff might be, he was constantly told he had no equity; often too he was sent to a court of common

law, though the matter could more fitly be decided in equity.

An instance of this occurred not long before the Judicature Act. A difficult question arose as to the true construction of a will. There was the will; the only question was, What did the testator mean by the words which he had used? The parties were more or less friendly. Mr. Dart, the great conveyancer, drew up a special case, stating the facts clearly and setting out the will. This special case was argued solemnly for three days before Vice-Chancellor Wickens. Mr. Lindley, who had just taken silk, led Mr. Macnaghten for the plaintiffs; Mr. Dickinson, Q.C., was counsel for the defendant. Great learning and ability were displayed on either side; the matter was thoroughly argued; and then the time came for the Vice-Chancellor to give his judgment. He said that the case raised a very interesting question, that it had been admirably argued, and that he had a very clear idea in his mind as to what was the true construction of the will. But he was also clearly of opinion that all the limitations of the will were legal limitations, and, that being so, he had no jurisdiction; he could pronounce no judgment; the matter, he said, must go before a court of law. It never did: the parties lost their thirst for litigation; and no one knows to this day which is the true construction of that will!

And yet the Court of Chancery and the courts of common law constantly required the assistance of each other. When the evidence before it was conflicting, the Court of Chancery was hopelessly at sea. There is only one method of arriving at the truth in such cases, and that is by examining and cross-

examining the witnesses personally in open court. This the Court of Chancery never did. It was constantly, therefore, compelled to send issues of fact to be tried at the Assizes or in Westminster Hall. Again, when any question of legal right or any point of commercial law arose incidentally in a Chancery suit, the parties were sent to the courts of common law. On the other hand, the courts of common law were sadly defective in their procedure before trial. They could do little or nothing to assist a litigant to prepare his case or to preserve the property in dispute pending the action. If discovery of documents was needed, if it was necessary to administer interrogatories, if an injunction had to be issued to prevent a threatened injury, in each case the plaintiff was driven to commence proceedings in equity auxiliary to his action at law.

### *The Courts of Common Law.*

And not only were the common law courts at Westminster wholly distinct from the Court of Chancery, but there were three distinct courts of common law in Westminster Hall: the King's Bench, the Court of Common Pleas, and the Court of Exchequer. Historically, the functions of these three courts were entirely separate. The King's Bench originally dealt only with matters in which it was alleged that some usurpation of authority or jurisdiction or some violation of the King's peace had taken place. The Court of Common Pleas was the proper tribunal for settling private disputes between subjects. The Court of Exchequer dealt only with matters affecting the King's revenue. But this had

all been altered before the year 1800. As the commerce of England developed, the litigation between private citizens rapidly increased, till the Common Pleas had far more work to do than either the King's Bench or the Exchequer. Even judges are—in some respects at least—only mortal. And they were paid by fees. The amount of the fees varied with the number of cases in their particular court. Hence the judges of the King's Bench and the Barons of the Exchequer began at a very early period to try and attract into their respective courts work which really belonged to the Court of Common Pleas. For this purpose recourse was had to the pleasing device of a legal fiction. A plaintiff who was owed £50 and wished to sue for it in the King's Bench would issue a writ declaring that the defendant had broken his close with force and arms, and also owed him £50. Then when the case got into court one heard no more of the close or the force and arms; the action was all about the £50 and whether the defendant really owed the money. That is what Tennyson means in his poem of "Edwin Morris, or the Lake." When the relatives of Letty Hill wished to get rid of Master Edwin Morris,

> "They set an ancient creditor to work:
> It seems I broke a close with force and arms.
> There came a mystic token from the king
> To greet the sheriff, needless courtesy!
> I read, and fled by night."

A similar fiction was employed to bring business into the Court of Exchequer. If one subject wished to sue another for £100, the action was one which strictly should have been brought in the Court of Common Pleas. But it often happened that his attor-

ney for some reason preferred to issue his writ in the Court of Exchequer. In that case he alleged that the plaintiff owed the King £100, that the defendant owed the plaintiff £100, that the defendant would not pay the plaintiff, and so the plaintiff could not pay the King. But at the trial the plaintiff never attempted to prove, and the defendant was not permitted to deny, that there was a debt due to the King ; that was taken for granted, and the jury only tried the issue as to the debt alleged to be due from the defendant to the plaintiff. In this manner all three of the Superior Courts at Westminster acquired jurisdiction over all ordinary common law actions.

But there still remained essential differences between these three courts. The King's Bench had authority over all inferior courts ; it prohibited all usurpation of authority, all excess of jurisdiction ; it supervised the decisions of Justices of the Peace ; it kept the Ecclesiastical Courts and the Admiralty within bounds ; it was a criminal court as well as a civil ; and it also had the special power of compelling by writ of mandamus all public bodies and public officers to perform their statutory duties. In 1800 Lord Kenyon was Lord Chief Justice, and Grose, Lawrance, and Le Blanc, JJ., were the puisne judges of the Court of King's Bench.

The Court of Common Pleas, the oldest of the three courts, was still the only Court in which "a real action" could be brought ; such, for instance, as an action to determine which of two persons owned certain land. Moreover, only serjeants-at-law could argue or be heard in the Common Pleas. Their juniors might sit behind them, might even venture to prompt them, but they could not address the Court.

This monopoly lasted till the year 1847. Over this Court Lord Eldon presided in the year 1800; he became Lord Chancellor in April the next year. He had three puisne judges to assist him: Buller, Heath, and Rooke, JJ.

The Court of Exchequer still had exclusive jurisdiction over all revenue cases and a few other matters; it was also a court of equity and helped now and again with the Chancery business. Chief Baron Macdonald was at its head; Hotham, Thompson, and Chambre were the Barons of the Exchequer in the year 1800.

### *Technicalities.*

Such were the three Superior Courts of common law at Westminster. How did they do their work? I am sorry to say that they were sadly hampered in the year 1800 by cumbrous procedure and pedantic technicalities which caused the suitors expense, delay, vexation, and disgust. It took years for a merchant to recover a debt due to him. And half the actions were decided not on their real merits, but on questions of form and pleading.

In the first place, our judges in those days were pedantically strict as to the form of action in which the plaintiff sued and as to the technical language in which claims and defences appeared on the records of the Court. There were only so many "forms of action" recognised by the Court; and every plaintiff had to pin himself down to one of these. If he selected the wrong one, he would at the trial be non-suited and have to pay the defendant's costs, although an action would have lain if the declaration had been differently drawn. The Court never decided that no

action lay on such a set of facts; but only that an action of that particular form did not lie. Hence in some cases it was only by a costly process of elimination that a plaintiff could ascertain for certain which was his proper legal remedy. For instance, if he sued in trespass and trespass did not lie, he was non-suited and had to pay the defendant's costs. When he had paid these costs, he could begin again. This time perhaps he would sue in trover. Well, if trover did not lie, the plaintiff was non-suited a second time, and had to pay the defendant a second set of costs. Then, if he was a very bold man, he could issue a third writ—say in detinue. And this time perhaps the Court would reward his pluck and perseverance by holding that detinue did lie.[1]

The Courts, too, were very strict over all questions of joinder of parties and joinder of causes of action. You could not join two different forms of action on the same writ. A claim on a covenant could not be joined in the same action as a claim for a simple contract debt. If the defendant trespassed on the plaintiff's land and also called him a thief and a robber, the plaintiff had to issue two writs, one for trespass and one for slander. If a man and his wife went out for a drive and were run over by a cart, the husband would have to bring one action for the injury to himself and the doctor's bill which he would have

[1] Now all "forms of action" are abolished; it is no longer necessary for the plaintiff to state either on the writ or on the pleadings whether the plaintiff is suing in trespass or on the case, in detinue or in trover. Each party now states the facts on which he relies; and the Court will declare the law arising upon the facts pleaded. If on those facts the plaintiff would have been entitled to recover in any form of action, he will now recover in the action which he has brought.

to pay, and the husband and wife together would have to bring a second action for the injury done to the wife, and her pain and suffering—double cost and double worry—though their respective causes of action arose out of the same transaction and involved inquiry into the same facts which would have to be proved in each action by the same witnesses.[1]

### *Legal Fictions.*

And the judges still revelled in "legal fictions." The action of ejectment was a conspicuous example of this. The writ in this action alleged all kinds of things that never happened. The claimant was a wholly fictitious person, called John Doe. He was mixed up with another imaginary character called Richard Roe. And sometimes we gain a fleeting vision of the two other estimable personages, Thomas Goodtitle and William Styles "of Newbury in the County of Berks," honest tillers of the soil, who had in reality no more existence than Mrs Harris. The action was brought by John Doe, who averred that the owner of the land had given him a lease, which had not yet expired, of a certain tenement. Then came Richard Roe, and "with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, and ejected the said John out of his said tenement, and other wrongs to him did." A bloodthirsty villain this Richard Roe would seem to be. But no! a little later on in this romantic story you will find him acting in the most kindly and considerate way. For now the imaginary Doe has issued

[1] See now Order XVI. r. 1, and Order XVIII. r. 1.

a writ against the imaginary Roe. And the imaginary Roe thereupon reflects that he is but "a casual ejector": he never really was in possession of the land. But he gratuitously takes the trouble to find out who is now in possession; and here at last the real defendant appears upon the scene. To him says Richard Roe: "Look here, I have been made defendant in an action of ejectment at the suit of one Doe, who claims that he is entitled to possession of this farm. I have no interest in the matter; I cannot very conveniently appear in court, because I don't exist. So I shall have to let judgment go by default; and then the sheriff will put Doe into possession and turn you out. But I thought it right to come to you first and tell you this; and, if you like, you can appear in court instead of me, and procure yourself to be defendant in my place." The defendant invariably thanked him, and acted on his advice. Accordingly on the proper day the defendant, and not Richard Roe, appeared in court, and obtained the leave of the judge to be made defendant in the place of his fictitious friend; and this prevented judgment being signed in favour of Doe, which would infallibly have led to the defendant's being turned out of his farm. But this leave was only granted on one condition, namely, that in the forthcoming legal proceeding the defendant should never seek to deny the existence of the lease to Doe, or the forcible entry of Roe, or his ouster of Doe. The Court would not allow these fictions to be traversed. You will scarcely believe me when I tell you that this fictitious narrative of the adventures of unreal persons in connection with a lease which never existed, continued down to the

year 1852, the invariable and necessary prelude to a claim for possession of land.[1]

### *Rules of Evidence.*

Equally absurd were the rules of evidence which regulated the trial of actions in 1800. The mouths of those who knew most about the matter in dispute were closed. No one could give any evidence if he or she had the slightest interest in the result of the litigation. Neither the plaintiff nor the defendant could be heard.

When as a boy I read the *Pickwick Papers*, I was always puzzled to know why Mr. Pickwick did not go into the witness-box, and say that he never promised to marry Mrs. Bardell, and explain how the good lady came to make such a mistake. But I know now that when the *Pickwick Papers* were written neither the plaintiff nor the defendant was ever allowed to give evidence.

If there were several plaintiffs or defendants, the evidence of them all was excluded; so was the evidence of their respective husbands and wives. It

[1] There was of course a meaning in this fanfaronade. It was a device to enable an action of ejectment to do the work of a "real action." The procedure in all real actions had become so technical and absurd that no one brought a real action, if he could possibly help it. If A claimed that he was seized in fee of a certain close, and B denied it, the question properly could only be decided in a real action. But if A merely claimed possession as lessee, he could sue in ejectment. Hence a fictitious plaintiff Doe was put forward; he only claimed possession under an imaginary lease; and therefore could bring ejectment. The defendant denied the title of his lessor and his right to grant the imaginary lease; and this was the sole issue tried in the action. The real plaintiff was the person who is always alluded to in the pleadings and in the reports as "the lessor of the plaintiff."

was supposed that they might commit perjury, because they had some remote interest in the damages or the property sought to be recovered in the action. If a man insured his life, and died, and the insurance company resisted the claim made by his executors on the ground that the deceased had shortened his life by habitual intemperance, no member of his family could give evidence as to the real habits of the deceased, unless he or she was excluded from all benefit under the will. A merchant whose name had been forged to a bill of exchange had to sit by, silent and unheard, while his acquaintances were called to offer their conjectures as to the handwriting. If A assaulted B in a lonely lane, and no one else witnessed the assault, B could recover no damages unless A had obligingly admitted the assault in the presence of some disinterested stranger.

Moreover, in those days no witness might give evidence unless he first took an oath in such form as would bind his conscience. But there were many most scrupulous and veracious persons who, taking too literally the admonition, "But I say unto you, swear not at all," refused on conscientious grounds to take an oath, even at the bidding of an officer of the State. There were others who had no religious belief, and to whom therefore an oath was meaningless. Both classes of persons were excluded from the witness-box, though they were ready and willing to state the truth, the whole truth, and nothing but the truth.

### *Defects and Abuses of Procedure.*

Then, again, in the year 1800 a Court of Common Law could only grant relief of three kinds. It could

order the sheriff to place the plaintiff in possession of certain specified land; it could order the defendant to return a chattel to the plaintiff, or in default to pay the plaintiff its value; in all other cases the judgment was simply for so much money, debt or damages. A court of common law could not order a contract to be specifically performed. It could not grant an injunction to restrain a threatened injury or to prevent any repetition of a wrongful act; it could not make a declaration as to the right or title of the plaintiff; it could not order a defendant to prepare and submit an account. It had no sufficient control over the property in dispute while the action was proceeding. It could not appoint a receiver to receive the rents of the property or to look after it or repair it till the Court had decided whose property it was. Still less could it appoint a receiver in aid of execution. Nor could the Court compel either the plaintiff or the defendant to answer interrogatories before the trial or to disclose what documents he had in his possession that were material to the matters in dispute in the action. For assistance of this kind the suitor was compelled to file a bill in equity in addition to his action at law.

These deficiencies seem anomalous to us in the year 1901; yet they caused little or no uneasiness to the practitioners in the first half of the last century. But there were two rights which a creditor then possessed, the exercise of which did provoke considerable criticism, viz., the right to arrest the defendant on mesne process, and the right to take his body in satisfaction of the debt.

The defendant on being served with the writ usually appeared and put in as sureties for his future

attendance "common bail," who were just our two dear old imaginary friends, John Doe and Richard Roe over again. But if the plaintiff liked to swear an affidavit that the defendant owed him £10 or upwards, he might at once arrest the defendant and put him in prison and keep him there, unless and until he put in "special bail," *i.e.* till he found two real and substantial sureties for his appearance at the trial. After judgment, as I told you in my first lecture,[1] any debtor who could not or would not pay the amount for which judgment was given against him was imprisoned for the rest of his life, unless his family or friends would pay the debt for him. Thus to lock a man up and prevent his earning any money seems to us a cruel as well as a futile proceeding. But it was stoutly defended by judges and lawyers in the days of George IV. and William IV. The imprisoned debtors (unless they could afford to pay extortionate sums for slightly better accommodation) were confined in small dark damp crowded rooms —rooms with no ventilation and often full of vermin. No bed was provided; the sexes were not separated; moral corruption and physical disease were the inevitable results. The misery which they suffered is powerfully described in the pages of Dickens and Thackeray. In nearly every one of their novels some leading character is arrested for debt, either on mesne or final process. And you must not think that Thackeray and Dickens exaggerated the abuses which they condemned. These great novelists knew what they were writing about; and so did their readers. Both writers had their eyes open, and were well aware what was going on around them. Both were students

[1] *Ante*, p. 13.

of the Middle Temple. Thackeray became a member of that Honourable Society in 1831; Dickens in 1839. I wonder if they ever dined together at the same mess in our beautiful old hall.

## *Delay.*

All this cumbrous procedure, these technical pleadings, and preposterous rules of evidence caused the suitors, as I have said, much vexation of spirit and much unnecessary expense. But the thing of which they most complained was the intolerable *delay*. There was more work than the Courts could manage under their antiquated arrangements. The old-fashioned system was that the Court only sat *in banc* (to decide questions of law and procedure) during term. There were only four terms in the year; each lasted for about three weeks. During term, as a rule, all four judges sat together *in banc*, and there were no courts for the trial of actions at *nisi prius*. After term the three chiefs would sit at Guildhall for about a fortnight, while the puisne judges went on circuit. This arrangement worked well enough in the eighteenth century, but as soon as the war with France was over, the wealth, commerce, and population of England advanced by rapid strides, and the amount of litigation increased in proportion. But the Courts sat for the trial of London and Middlesex jury cases only a very few weeks in the year. Men of business complained bitterly that it took at least twelve months to recover the money due on a promissory note. At the same time the work *in banc* was so much in arrear in the year 1800 that a rule *nisi* for a new trial granted then would not

in all probability be argued till 1802 or 1803; and then, if the rule were made absolute, the action would have to be retried. And at the end of each term every rule that was not disposed of had to be "enlarged," that is, formally adjourned to the next term. On the last day of term the court sometimes sat till past ten o'clock at night—more than twelve hours,[1] and on that day a crowd of counsel and attorneys attended, whose one anxiety was to have their pending rules enlarged. The King's Counsel in the front benches spent the day in obtaining the formal leave of the court, and as each rule was enlarged they marked the brief with a large "E." Early in the present reign a friend asked Sir Frederick Thesiger (afterwards Lord Chelmsford): "How do you manage to get through your business in the Queen's Bench?" "We find no difficulty," was the reply, "we do it always with great Ease."[2]

## *The Court of Chancery.*

And now turn to the Court of Chancery. Was its machinery in better working order? Truth compels me to answer, No. Mr. Birrell described to you most graphically last term[3] the humours of a bill in Chancery and of the answers thereto, and the whole process of "scraping the conscience of the defendant."

[1] *Life of Lord Campbell*, vol. ii., p. 292.

[2] When the Queen came to the throne, it is said there were no less than 300 rules waiting for argument. An Act of Parliament, however, was speedily passed to enable the Queen's Bench, the Common Pleas, and the Exchequer to hold sittings *in banc* after term, and so to dispose of the business left unfinished on their hands.—(1 and 2 Vict., c. 32, extended by the C.L.P.Act, 1854, s. 95).

[3] *Ante*, p. 181.

It is true that by this process the plaintiff in a Chancery suit could compel his opponent either to perjure himself or to make valuable admissions, which may or may not be regarded as an advance on the methods of the courts at Westminster. But, except in this respect, the law of evidence was the same in Chancery as at common law. None of the plaintiffs could give evidence: the defendant could never tell his own story in his own way; he could only answer the interrogatories put to him by the plaintiff; no other person who was in any degree interested in the result of the litigation could give evidence at all. And the Chancery method of taking evidence was far worse than anything at common law; since the darkest period of the Middle Ages there has been no forensic procedure more pedantic and absurd. As Mr. Birrell told you,[1] the evidence in a Chancery suit was taken by means of a commission. Interrogatories written down beforehand upon paper were administered to the witness in private before an examiner sworn to secrecy. None of the parties were allowed to be present, either by themselves or their agents. Cross-examination under such conditions became a farce, for the witnesses could only be asked certain questions which had been prepared and written down in advance by a counsel who never had the opportunity of seeing the witnesses or knowing what they would say in their examination in chief. Then when the pleadings had been amended and re-amended, and a voluminous body of evidence taken on commission and copies made for the parties at their expense, the suit was entered for hearing. But when it would really be heard, no one could say.

[1] *Ante*, p. 188.

The delays in the Court of Chancery were far worse than the delays at common law. It was not uncommon for four years to intervene between the time when a cause was set down for trial and the final judgment therein. As a rule each contested suit had two hearings, which were separated by a period of at least two years. Petitions filed in 1810 were still undisposed of on May 30th, 1825. No lawyer now alive can conceive what a Chancery suit was like in the days of Lord Chancellor Eldon.

In the interval probably some one or other of the parties would die. Now the Court of Chancery was just as strict about parties as the courts of common law. It was a strict rule that every person interested in the result of the litigation must be made a party to the suit. It apparently did not matter much whether he was made a plaintiff or a defendant. But the Court of Chancery liked to see some twenty names as plaintiffs, and at least a dozen defendants. If any one of these happened to die while the cause was jogging slowly on, a bill of revivor or a supplemental suit became necessary to reconstitute the charmed circle of litigants which had been broken, and this would cause a delay of at least a year. It is difficult to see how a suit with fifty persons parties to it (not an uncommon thing in those days) could ever have been tried at all; for the average death-rate in England then was more than one in fifty every year.

You must remember that in the year 1800 the Court of Chancery had only two judges—the Lord High Chancellor and the Master of the Rolls. It is true, as already mentioned, that the Barons of the Exchequer did a little equity work when they had finished their revenue cases; but they could only

render slight and intermittent assistance. The Lord Chancellor was of course a political personage, and changed with every new ministry; he had to preside over the sittings of the Legislative Chamber of the House of Lords; he sat when he could as a judge of first instance; he sat also by himself to hear appeals from the Master of the Rolls, who was often a better equity lawyer than himself; he also presided over the House of Lords when it sat as a Law Court and heard cases of error from the Exchequer Chamber, and also appeals from himself when sitting alone as a Judge of Appeal. This was not a satisfactory arrangement; it was impossible for the Lord Chancellor to get through his work; the Court was clearly undermanned. In 1815 a new Chancery Judge was appointed, with the title of Vice-Chancellor of England. But this addition to the judicial staff of the Court of Chancery was wholly inadequate; for you must remember that to this court flowed all the equity business of the kingdom of England and Wales, whether contentious or non-contentious.

And when at last the hearing was reached, and a decree made, the litigation in most cases was by no means over. The cause then went into chambers for the purpose of taking accounts or making inquiries. Any amount of time might be spent over this process. Then at last the Master would report. Then any party who thought that the report was not sufficiently in his favour would bring in objections to the Court. These would come on for hearing in due course, and, if any objection was successfully upheld, the cause would be sent again to chambers, and the process recommenced *da capo*. No man in those days could embark on a Chancery suit with any reasonable hope

of being alive at its termination if he had a determined adversary.

And in addition to these accounts and inquiries, it would often happen that an issue as to some disputed question of fact would have to be settled and sent for trial at the Assizes, or a point of law would have to be submitted to a common law court. But the verdict of the jury when given, or the opinion of the court of common law when obtained, in no way concluded the conscience of the Court of Chancery when it resumed charge of the cause. It had full power, if it saw fit, to send the same issue to a new trial, or to disregard altogether what had been the result of the intermediate expedition into the domain of common law. It is recorded that a case was heard in February, 1830, in which there had been seven trials—three before judges of the King's Bench, and four before the Lord Chancellor—at the close of which the suit floated serenely upwards to the House of Lords! No doubt when a suit reached its final stage—when all inquiries had been made, all parties represented, all accounts taken, all issues tried —justice was ultimately done with vigour and exactitude. Few frauds ever in the end successfully ran the gauntlet of the Court of Chancery. But the honest suitor emerged from the ordeal victorious rather than triumphant, for too often he had been ruined by the way.

And all this elaborate procedure, which necessarily involved delay, uncertainty, and untold expense, had to be gone through in every Chancery suit, whether there was any real dispute between the parties or not. Often in equity matters all that is needed is the administrative assistance of the Court. It would

often happen that all members of a family merely desired that the wishes of a testator, whom they had all known and respected, should be accurately and correctly carried into effect. They wished first to have his will correctly construed, then to have his assets collected, the classes entitled to various legacies ascertained, and the estate properly administered as amicably and as quickly as possible. But, though nobody wished for war, all the forms of war had to be gone through; the action had to be fought from beginning to end just as though every question of fact was in dispute, and the parties were all at daggers drawn. Such a thing as an originating summons was never dreamed of in those days.[1]

At this time, too, the Chancery judges never sat in Chambers. The work which is now done in Chancery Chambers was then left entirely to the Masters of the Court of Chancery. These gentlemen were supposed to investigate titles, to take accounts, to manage the property of the wards in Chancery, to tax costs, and generally to act in aid of the judge, and to investigate and report to the judge upon all matters which the judge referred to them. But the greater part of these duties they discharged by deputy, and neither they nor their deputies seem ever to have been in any hurry.

If the master did not choose to hurry, the plaintiff had no power to make him hurry, and even if the master and the plaintiff were both anxious to expedite matters, they seem to have had little or no power to force on a procrastinating defendant. Then there were six officers known as the Six Clerks. I have been unable to ascertain what duties these

[1] See *ante*, p. 10.

gentlemen performed; but they each drew £1600 a year. Then there were thirty Clerks in Court, who appear to have been more like London agents than officers of the court; but they were paid by fees, and the Chief Clerk in Court generally made an income in excess of the salary of the judge. All these offices are now abolished, thanks largely to the efforts of the Council of the Incorporated Law Society, with Mr. Edwin Field and Mr. W. Strickland Cookson at its head.

### *Other Courts.*

There were other courts of law in 1800. There was the Court of Exchequer Chamber, before which writs of error were brought on judgments of the King's Bench, Common Pleas, and Exchequer. Appeals from the Colonies and in prize causes were heard before the Lords of the Privy Council at Whitehall. The House of Lords was the final Court of Error in all other civil and criminal matters. The High Court of Admiralty sat at Doctors Commons and twice a year for criminal cases at the Old Bailey. There were Ecclesiastical Courts also at Doctors Commons; the Prerogative Court for wills and administrations; the Court of Arches for appeals from inferior Ecclesiastical Courts in the Province of Canterbury; the Court of Peculiars, which was a branch of the Court of Arches; a Faculty Court, which granted dispensations to marry; and a Court of Delegates for ecclesiastical affairs. All these you may read about in the pages of *David Copperfield*. Then there were three ancient Palatinate Courts, in the county of

Durham, the county of Chester,[1] and the Duchy of Lancaster respectively. The Cinque Ports had also their own special judge; so had the Isle of Ely. You can read about these courts in the fourth part of Coke's *Institutes*, chapters 36-42. In the Principality of Wales there still flourished the Courts of Great Sessions, which had existed there since the reign of Henry VIII.[2] There were two justices for the counties of Chester, Montgomery, Denbigh, and Flint; two for Anglesea, Carnarvon, and Merioneth; two for Carmarthen, Pembroke, and Cardigan; and two for Brecon, Radnor, and Glamorgan. These were all Superior Courts.

There were also Inferior Courts of Record. There were the Borough Courts, generally presided over by the Recorder of the Borough, which had jurisdiction only when the cause of action arose within the borough. Of these the Lord Mayor's Court in the City of London was the most conspicuous example; its existence was a great boon to the citizens of London. There was also the Tolzey Court at Bristol, the Liverpool Court of Passage, the Salford Hundred Court, and about twenty others, some of which now are defunct. There was also a Court of Hustings, a Chamberlain's Court, a Sheriff's Court, and a Court of Orphans in the City of London. A Pie-Poudre Court was also held at Bartholomew Fair "for immediately administering justice between buyers and sellers." There was a Court of Record at Southwark and a Court of the Marshalsea as well.

[1] The Court of the County Palatine of Chester was abolished in 1830.

[2] See the Statute 34 and 35 Henry VIII., ss. 25, 91, 92, 93, 101, 127.

At Westminster there still flourished that Palace Court whose iniquities formed the subject of one of Thackeray's most amusing ballads.[1]

The ancient County Courts, which had formerly some small civil jurisdiction, were practically obsolete before the commencement of the nineteenth century. There were also in the year 1800 54 "Courts of Requests," established in different localities at the special request of the inhabitants, by 54 separate Acts of Parliament, the first of which was passed in the reign of James I. These courts collected small debts only; they were of very varying degrees of efficiency; they had only a limited jurisdiction; and were wholly inadequate to the needs of the provinces. And there were yet in existence Courts Leet and Courts Baron, which still possessed some civil jurisdiction in cases concerning land. You can read in the early editions of Blackstone's *Commentaries* (Appendix to Vol. III.) how a Writ of Right Patent could be moved out of the Court Baron by a Writ of Tolt into the County Court, and thence by a Writ of Pone into the Court of Common Pleas; then would follow a Writ of Right *quia Dominus remisit Curiam;* and John Doe and Richard Roe would once more obligingly give "pledges of prosecution"; and so after esplees and wager of battel the parties could "give gages" and their champions could appear "with competent armour, as became them, ready to make the battel aforesaid," and so all would go well. But I apprehend that all this ridiculous procedure

[1] Young Thesiger in 1821 purchased the right of being one of the four counsellors who alone could practice in this Court. The Palace Court was abolished in 1849, soon after the new County Courts were established.

was practically obsolete before George IV. succeeded his father.

*Reform.*

And now to briefly trace—it must be very briefly—the steps by which the procedure of our Courts was reformed. Our great English lawyers—with that enlightened charity which always refuses to begin at home—became convinced early in the century that the judicial arrangements of the Principality of Wales were far from perfect; and to the minds of some of them it was already clear that any efficient reform of the Welsh circuit system would necessarily involve the appointment of additional English judges. But it was not till 1817 that any definite step was taken in this direction. In that year a Select Committee was appointed by the House of Commons to inquire into the condition of the judicial system of Wales and Chester. Again in 1820 and 1821 like committees sat. The reports of these bodies contain a fund of information about the Welsh courts, their merits and their defects. But nothing was done then. In February, 1828, Mr. Brougham made a great speech in the House of Commons, exposing the abuses and attacking the defects of the English procedure—and indeed of the whole judicial system in England. This led to the appointment of the Common Law Commission, a body which subsequently presented four most valuable reports in 1829, 1831, 1851, and 1853.

The first report of this Commission dealt chiefly with the Welsh courts. It recommended that the jurisdiction of the Superior Courts of England should be extended so as to include Wales and Chester;

that three additional judges should be appointed, one to each of the English common law courts, and that the Courts of Great Sessions, which had existed in Wales and Chester ever since the reign of Henry VIII., should be abolished. These recommendations were carried into effect in 1830, in spite of the opposition of some of the Welsh members. Whether the alteration was in the end a benefit to Wales has been doubted by competent critics[1]; but the appointment of three additional judges was a great boon to our English suitors. The latter reports of the Common Law Commissioners led to those most valuable measures, the Common Law Procedure Acts of 1852, 1854, and 1860.

This abolition of the Welsh circuit system did no doubt inflict for some years considerable hardship on Welsh suitors, because in those days there were no County Courts such as they have now. The existing local courts in Wales had jurisdiction only up to 40s. Hence till 1846 it was necessary for a Welshman to bring his action in London whenever his claim exceeded 40s. And as there were no local courts at all in Wales that had any jurisdiction in equity, the administration of the smallest Welsh estate had to be effected here in Lincoln's Inn.

It is largely to the influence of Jeremy Bentham that we owe our present County Court system, which is such an inestimable boon to poorer suitors. He warmly and constantly advocated the establishment of local courts within at the very least half a day's journey of every individual, courts which should

[1] See *The Welsh People*, by the Principal of Jesus College, Oxford, and Mr. Brynmor-Jones, Q.C., M.P. (1900), pp. 391, 2.

deal out every kind of justice that might be required. Courts, he urged, should be accessible, like hospitals, every day in the year, and at every hour in the night. "Justice should only sleep when injustice sleeps also." Each court should consist of a single judge, who should have of course a proper staff of assistants, but who should be singly responsible for every step of the proceedings from beginning to end, and have all necessary powers vested in him for that purpose. "The sense of responsibility is always weakened by being divided." For the same reason there should be no jury, unless one was specially demanded by either party; and then only when a jury was needed as an additional security against despotism, class feeling, or corruption. The judge should be a skilled lawyer; not merely a successful advocate, but a man trained specially for judicial work as on the Continent.

This was Bentham's dream, but it was not till her present Majesty was on the throne that any court of the kind that he contemplated was called into existence. It took nearly half a century for any scheme of Bentham's to sink into the minds of the British public, and then to ooze through them into the brains of our legislators. The legal profession to a man ignored Bentham and all his works; they regarded him merely as an elderly gentleman full of visionary schemes which he dimly expounded in very bad English. But in the year 1833 a Royal Commission recommended the establishment of a general system of local courts all over the country for the recovery of small debts only. Several abortive attempts were made in successive years to carry this recommendation into effect. This was at last accomplished by

Lord Cottenham, who, as Lord Chancellor, introduced the Act of 1846 which created the modern County Courts. Though they were called County Courts they did not adopt either the constitution or the procedure of the ancient County Court (the oldest of our law courts). At first, these new courts had jurisdiction only in Common Law cases where the amount in dispute did not exceed £20, and even as to these there were several important exceptions. In 1850 the limit was raised to £50, and more effectual means were taken to deter plaintiffs from bringing petty cases into the Superior Courts. In 1856 these courts were enabled to try almost any question by consent of both parties; while, on the other hand, a case within the limits might be removed into a Superior Court at the will of the defendant on his giving security for costs. In 1857 their jurisdiction was extended to actions relating to wills or intestacy, where the property in dispute did not exceed £200, if personal, £300, if real. In 1865 they were empowered to deal with equitable claims of every kind, so long as the amount involved did not exceed £500. Later Acts have added jurisdiction in Bankruptcy and in some districts in Admiralty. Thus slowly have been built up the County Courts of to-day. There are now more than 500 of these courts, grouped into 54 circuits, and served by 54 judges. Each circuit has its judge who visits every court on his circuit on successive days and at short intervals. He administers law and equity concurrently, and finds no inherent difficulty in the task. He generally sits alone, according to Bentham's plan, but a jury of five may be had in most cases, if asked for. The proceedings are of so simple a character

that it is seldom necessary to retain a barrister, and the services of a solicitor can often be dispensed with. Justice, cheap and expeditious, has thus been brought to the very doors of all, and justice so good of its kind that new work is constantly being placed on the shoulders of the County Court judges. Proceedings under many of the most valuable of our recent Acts, such as the Agricultural Holdings Act, the Employers' Liability Act, and the Workmen's Compensation Act, can only be taken in the County Court.

So too, soon after the Queen's accession, men began to recognise that the inquiry after truth in courts of justice was often and needlessly obstructed by the incapacities created by the then law of evidence. In 1843 Lord Denman succeeded in carrying the valuable measure still commonly known by his name.[1] The preamble to this Act laid down the important principle that it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. This Act enabled all persons disqualified by interest to give evidence, except the parties on the record, or persons on whose behalf the proceedings were taken or defended, and their husbands and wives. Then when the new County Courts were established in 1846, the legislature exclaimed, "*Fiat experimentum in corpore vili* : we will let these new inferior courts hear the parties, and see how it answers." So the parties were allowed to

[1] Lord Denman's Act, 1843 (6 and 7 Vict., c. 85).

give evidence in the County Court, and the result was most successful. Then in 1851 Lord Brougham carried his famous Act, and made the parties competent witnesses in civil proceedings in the Superior Courts as well.[1] In 1853 the husbands and wives of the parties were declared to be admissible parties as well.[2]

It is interesting to note the views expressed by eminent lawyers as to Lord Brougham's Act of 1851. Lord Campbell wrote in his journal on June 19th, 1851: "It," that is, the Bill, "is opposed, as might be expected, by the Lord Chancellor. If it passes, it will create a new era in the administration of justice in this country. I support it, and I think it will be carried, although all the common law judges, with one exception, are hostile to it." And again, on November 30th, 1851, he says: "I am now sitting at Nisi Prius, working the new Act which permits the parties in a cause to give evidence for themselves. It has made a very inauspicious start—one party, if not both parties, having hitherto been forsworn in every cause. But I still hope that it may operate favourably for the elucidation of truth. One unfavourable effect it will permanently have—to increase the labour of the judge; for trials must last much longer, the new fashion being in every case to examine the plaintiff and defendant, *plus* all the witnesses on both sides who would have been examined under the old

[1] Law of Evidence Amendment Act (14 and 15 Vict., c. 99). There were two exceptions. The parties to actions for breach of promise of marriage and the parties to proceedings instituted in consequence of adultery could not give evidence till 1869 (32 and 33 Vict., c. 68, ss. 2, 3).

[2] 16 and 17 Vict., c. 83.

*régime*." Later he added a note dated October, 1856: "The Bill has since been made to work most admirably: all mankind praise it."[1]

Other disabilities have also been removed. In 1833 Quakers, Moravians, and Separatists who had conscientious objections to taking an oath were allowed to give evidence on making a solemn affirmation. And in 1837, all persons who had a religious belief were permitted to give evidence in court upon taking an oath in such form as they should declare to be binding on their conscience. In 1869 an Act was passed enabling any person who satisfies the judge that the taking of an oath would have no binding effect on his conscience, to give evidence upon his making a solemn promise and declaration that the evidence which he was about to give to the court should be the truth, the whole truth, and nothing but the truth.[2]

Till 1831 Bankruptcy business was entrusted to commissioners appointed separately for each case by the Lord Chancellor. A number of permanent commissioners were appointed in that year for the London district, and afterwards for county districts also, each of whom could act separately, when once set in motion by the *fiat* of the Lord Chancellor, but subject to the control, first of a Court of Review in Bankruptcy, and afterwards of one of the Vice-Chancellors. This arrangement was considerably modified in 1861. In 1869 the commissioners were all abolished; the country business was transferred to the County Courts, and a new court, presided over

[1] See the *Life of Lord Campbell*, vol. ii., pp. 292, 297, 298.

[2] 32 and 33 Vict., c. 68, s. 4. And see the Oaths Act, 1888 (51 and 52 Vict., c. 46).

by a Chief Judge, was created to deal with London bankruptcies.

In 1857 the Ecclesiastical Courts were shorn of their most important functions. Their jurisdiction as to wills and as to the distribution of personal property on intestacy was transferred to a new Court of Probate; a subordinate jurisdiction being vested, as we have seen, in the County Courts. At the same time, the jurisdiction of the Ecclesiastical Courts in matters arising between husband and wife was given to the closely connected Court for Divorce and Matrimonial Causes. So that now the Ecclesiastical Courts deal only with clergymen of the Established Church in their professional character. The jurisdiction of the High Court of Admiralty was enlarged in 1861, and it was made, in some respects at all events, a Superior Court. Now, as you know, these three courts are merged in one Division of the High Court of Justice, of which Sir Francis Jeune is the President.

The procedure of the Court of Chancery was enormously improved by two sets of Consolidated Orders, dated respectively May 8th, 1845, and February 14th, 1860.

In 1868 a new jurisdiction was conferred upon Her Majesty's judges; they were commissioned to try election petitions which had been formerly heard by a committee of the House of Commons. And this increase in the work of the judges afforded the Government an opportunity of increasing their number, a step which was much needed on general grounds. Three new judges were created, one for each of the three Superior Courts of common law.

In 1873 Lord Selborne, then Lord Chancellor,

with the assistance of Lord Cairns, his opponent in politics, carried successfully through Parliament the Judicature Act, which came in force on November 2nd, 1875. This Act created the Supreme Court of Judicature, each Division of which administers both equity and law, and is governed by the same straightforward and simple procedure. Every court now applies the same principles of law and equity to the actual facts of the case; every court has power to grant whatever form of relief the nature of the case may require, whether legal or equitable. This is the greatest and most beneficial law reform of Her Majesty's long reign. On December 4th, 1882, outward expression was given to this fusion of law and equity by the courts being physically united in one building—the new Royal Courts of Justice.

The judges of the Queen's Bench Division try causes either with or without a jury. They conduct the Assizes, civil and criminal, all over England and Wales. They preside at the Central Criminal Court. They are a Court of Appeal in County Court matters, and the final Court of Appeal in criminal matters. They prohibit all inferior tribunals from exceeding their jurisdiction.

The Chancery Division has now six judges who sit singly, the four senior judges having each a chief clerk and a body of clerks working under him. The bulk of the work of the Chancery Division is naturally confined to the equity business, to which its organisation is especially adapted. But its jurisdiction is complete; its powers are not confined to any particular subject-matter; it administers law as well as equity, though it never tries a case with a jury.

The Probate, Divorce, and Admiralty Division

manages the Probate, Divorce, and Admiralty business of the country, and controls the District Registries throughout England.

The Court of Appeal is composed of the Master of the Rolls and five Lords Justices, with the occasional assistance of the Lord Chancellor, the Lord Chief Justice of England, and the President of the Probate, Divorce, and Admiralty Division.

From the decision of the Court of Appeal, appeal lies to the House of Lords—to the judicial body known by this name, not to the legislative assembly. An ordinary peer of the realm can no longer sit in the House of Lords when it is exercising judicial functions. The Judicial Committee of the Privy Council hears appeals in ecclesiastical matters and also from the colonies. These Appellate Courts have been strengthened by the appointment of four paid Lords of Appeal, who attend regularly to the judicial business of both Courts, which will probably before long be merged in one.

The rules of Court made under the Judicature Act have defined the procedure, which is both simple and elastic. A Master now decides all interlocutory matters on a summons for directions, *e.g.* whether the action shall proceed with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case requires. Every amendment in any record, pleading, or proceeding that is requisite for the purpose of deciding the real matter in controversy, can be made at any stage of the proceeding.

The changes which I have so inadequately sketched are not final or unalterable. We have not attained perfection yet. Other modifications may be deemed

expedient hereafter. But the reforms to which I have referred to-night have all been made with the object, and have all had the effect, of simplifying the the procedure and improving the administration of our law. They have benefited our ever-increasing population; they have removed obstacles from the path of commerce, and promoted the general prosperity of the realm. Justice is in fact done in our law courts. No honest litigant of ordinary sagacity can now be defeated in an action by any mere technicality, or lose his case through any mistaken step or accidental slip. Litigation in 1800 was dilatory and costly; now it is cheap and expeditious. To borrow the language of Lord Brougham, the procedure of our courts was in 1800 "a two-edged sword in the hands of craft and oppression; it is now the staff of honesty and the shield of innocence."

W. Blake Odgers.

## VIII.

# CHANGES IN THE LAW OF ENGLAND AFFECTING LABOUR.

(Tuesday, February 5th, 1901.)[1]

### *Introduction.*

To convey to you, within the time which these lectures are allowed to occupy, a complete picture of the changes in the law of England affecting labour which have taken place during the 19th century, is a task impossible of accomplishment.

The subject is such a large one, its ramifications are so extensive, and yet so important that a mere enumeration of the statutes bearing, directly or indirectly, upon it would occupy all the time available. The history of the changes, and the causes leading up to them—without some explanation of which a mere recital of the statutes themselves would be of little value—are often so far removed and interwoven that a complete knowledge of the whole can

[1] This lecture was announced to be delivered on January 24th, 1901, but was postponed in consequence of the death of Her late Majesty. It was delivered on Tuesday, February 5th; but it is thought best that it should be printed in the place which it was originally intended to occupy in the series.

only be acquired by the expenditure of much time and research.

I can do no more to-night than direct your attention to such changes in the law affecting labour as may be said to be of the first importance, attempting in the course of doing so, to point out what was the previous state of the law, why the changes were so loudly demanded, and how they were brought about.

One observation, and one only, I must, to avoid possibility of misunderstanding, premise. The subject of my lecture is not the changes in the law during the last century affecting the labouring classes, but the changes in the law affecting labour; by which you must understand that I purpose bringing to your notice only such changes as have had a direct bearing on the relationship of master and servant—or, as they are now generally called "employer and workman."

Most of the important legislation of the 19th century, especially of that large part of it during which our late beloved Queen exercised her beneficent rule, has been devised with the object of ameliorating the condition of the working classes, either directly, as in the case of legislation having for its object the cheapening of food, the improvement of dwellings, the providing cheap locomotion, or indirectly by means of enfranchising laws, enabling these classes to work out their own salvation. All such questions as these, however, are foreign to our subject to-night, which deals only with the legal rights granted to and legal restrictions removed from workmen in connection with their contracts and conditions of service.

To understand the value and effect of the laws most directly affecting this relationship, which have been passed at various times during the 19th century, it is convenient to consider what was the legal position of the workman at the commencement of the century, indeed, even before its commencement.

### *Limited power to contract.*

Let us first see the position in which the workman stood with reference to his power to contract as to his own labour, and the terms on which he was willing to work, and then consider how the law regarded any effort on his part to better such position.

Now, as you doubtless know, a great deal of the labour employed in agriculture in England in early times was forced labour, dependent on the power of the lords of the soil or other persons of influence to enforce their commands on the weaker part of the community, but by the time of the reign of Edward III. it had become to a great extent free.

In the twenty-third year of that reign was passed the First Statute of Labourers,[1] in consequence (so it has been stated) of the scourge called the Black Death, which so reduced the number of labourers in England that they asked for increased wages. This Act gave a statutory sanction to the forcing of labour, and, although it fell into desuetude, even before the 19th century, was, I think, only repealed in the year 1863 by the Statute Law Revision Act of that year. It declared: "That every man and woman of England, free or bond, able in body and within three score years, not exercising craft nor having of his own

[1] 23 Ed. III. c. 8.

whereon to live, nor land to till nor serving any other, should be bound to serve such person as should require him at the wages heretofore accustomed to be given." If he refused he was to be committed to prison. Penalties were also imposed on any master paying, or workman receiving, more than the rate of wages previously given.

But although the workman was compelled to work for whoever might require him, he was allowed no voice in the fixing of his own wages. A statute of the 12th year of Richard II. (1388)[1] fixed the wages to be paid in agriculture. The next year[2] the Justices of the Counties were required to fix and to proclaim what wages should be paid to day labourers. In the reigns of Henry VI. and VII.[3] the wages of both labourers and artificers were fixed with much minuteness. The rates of wages so fixed were, for the time, binding on master and servant alike; but in the reign of Henry VIII.[4] the penalties for not paying the wages authorised by the statute of Richard II. were repealed so far as they related to the masters. The effect of this statute was, that although the workman could not demand more than the statutory wages, the master could pay less.

In the reigns of Henry VIII. and Edward VI.[5] statutes of ferocious atrocity were passed directed against vagrants and persons unwilling to work, and the children of such persons were permitted to be

[1] 12 Richd. II. c. 4. [2] 13 Richd. II. c. 8.

[3] 6 Henry VI. c. 3; 8 Henry VI. c. 8.; 23 Henry VI. c. 12; 11 Henry VII. c. 22.

[4] 4 Henry VIII. c. 5.

[5] 22 Henry VIII. c. 12; 27 Henry VIII. c. 25; 1 Ed. VI. c. 3; 3 and 4 Ed. VI. c. 16.

reduced to a condition akin to slavery. Later on was passed the well-known Statute of Elizabeth (5 Eliz. cap. 4), sometimes called the "Statute of Labourers," sometimes the "Statute of Apprentices."

This Act—so the Royal Commission on Labour, which sat in 1875, reports—was the result of the social revolution caused by the suppression of the monasteries by Henry VIII., which led to a large number of unemployed persons wandering about the country. By this Act many of the former ones, regulating labour and wages, were repealed. It provided for the fixing new rates of wages annually by the Justices of the Peace in Session; fixed the hours of work for artificers and workmen in husbandry, and declared that such workmen must work for whoever might require them. Stringent penalties were decreed against any labourer who should quit his town or county without a permit. By a still later Act (1 James I. c. 6) the power of the Justices to fix wages was extended, and they were empowered and commanded to fix the wages of all labourers and workmen. This law, however, appears to have fallen into disuse in the early part of the 18th century, though expressly revived as regards the woollen industry (but only for a year or so) by an Act of the 29th year of George II.[1] The Statute of Elizabeth remained on the Statute roll until the year 1814, and was then only repealed in part.[2]

### *Combination Acts.*

But whilst workmen were compelled by the legislature to work for whoever might require their

[1] 29 Geo. II. c. 33. [2] See 54 Geo. III. c. 96.

services, at wages at all events not exceeding those fixed for them—for they often got less—numerous Acts were passed dating from the middle of the 14th century, directed against combinations in different trades for the purpose, either of increasing wages or reducing the hours of work, or in any manner attempting to lessen the amount of work.

These Acts culminated in a strong statute against combination passed in the year 1800 (39 and 40 Geo. III. c. 106). This important measure was heralded by the *Times* newspaper in its issue of the 7th January, 1800, in the following words: "One of the first Acts of the Imperial Parliament will be for the prevention of conspiracies among journeymen tradesmen to raise their wages. All benefit clubs and societies are to be immediately prohibited."

The Act fulfilled the description given of it. All combinations for obtaining an advance in wages, or altering the hours of working, or decreasing the quantity of work, or preventing any person employing whomsoever he might think fit, or endeavouring to prevent workmen hiring themselves, or prevailing on others to quit work, were declared illegal, as was also the attending meetings held to advance any of these objects, or giving money to persons engaged in such associations. The punishment was imprisonment.

Such was the state of the law as to combination amongst workmen at the beginning of the 19th century.

To speak of contracts between master and workmen at this time is a misnomer, for there was no assent of will on the part of the workman, or any real power to negotiate as to the terms of his so-called contract.

## *Rise of Trades Unions.*

The very instinct of self-preservation impelled workmen to revolt against such one-sided laws. Associations for the protection of their trades had been formed by workmen as early as the 14th century. These, though sternly repressed, continued to exist in one form or another until in the 18th century the workmen of most of the chief industries of the country had established protection associations, which have in later times under the name of "Trades Unions" exercised so powerful an influence over the relationship of capital and labour. Somewhat oddly, although the advance of wages and the improvement of the conditions of labour were in part responsible for the introduction and continuance of such societies, the primary object of most of the unions formed in the 18th century was not to bring about the alteration of, but to maintain, the existing laws relating to labour.

The fixing of wages by Justices had fallen into disuse. Workmen were consequently often entirely at the mercy of the master, who in many instances virtually fixed the wages himself and to suit himself.

An important object of the early Trades Unions was the maintenance of the statutory rates of wages. A still more important reason, however, for their formation was the continual violation by employers of the Statute of Apprentices (5 Eliz. cap. 4).

This statute forbade any workmen exercising a craft or industry until he had been apprenticed thereto for seven years; and provided that the masters should only employ a fixed number of apprentices, proportioned to the number of journeymen they employed. Towards the end of the 18th century this Act was

continually violated by the masters. No doubt this was in great part owing to the rapid introduction of machinery driven by steam power, involving a discontinuance of the domestic workshops, and the establishment of "factories" in which it was found convenient to employ large numbers of apprentices, and children and women who had never served an apprenticeship.

The main aim of such unions as the Institution of Clothworkers of Halifax, the Hatters' Union, the Tailors' Union, the Union of Stocking Makers, of Calico Printers, and of Silk Workers was to destroy this custom of free labour by insisting upon the enforcement of the "Statute of Apprentices."

All these associations were illegal, not only by Statute but at common law, being regarded as combinations in restraint of trade.

After the stringent Act of 1800 many of the Unions were carried on under the guise of Friendly Societies.

After a struggle of about 100 years the Statute of Apprentices, in so far as it required apprenticeship as a condition precedent to the exercise of a trade, was, in the year 1814 repealed. When skilled labour thus became freed from statutory interference the Unions continued to flourish. But though the legal protection of their trades had been taken from workmen by the Act abolishing the apprenticeship system, self-help, by the Act of 1800, was illegal and criminal. But a great change was impending.

In the year 1824, by an Act of Parliament (5 Geo. IV. cap. 95), the whole of the Combination Acts were swept away. This statute repealed 35 Acts or parts thereof forbidding combination amongst work-

men to raise wages or alter conditions of work, and, not sure even then that all had been enumerated, a general provision was added abolishing all other Acts of the like nature. Henceforth both masters and workmen were declared exempt from punishment under any Statute or under the common law for association with the object of furthering the interests of their trade.

The time chosen for this experiment was unfortunate. The year 1825 was a disastrous one for commerce. Workmen suffered greatly; many riots took place, and Trades Unions with avowed objects most hostile to the masters sprang up all over the country. The result was that the next year the Act of 1824 was repealed, and another Act (6 Geo. IV. cap. 129) was passed. By this latter Act, although the Combination Acts were again repealed, the trades associations were replaced under the common law of the land, and the members thus again became liable to be prosecuted for conspiracy. An exception was made in favour of meetings held to discuss rates of wages or to limit hours of labour. Penalties were imposed when the objects of such associations were attempted to be furthered by violence, threats, or intimidation, and two new offences—designated "molestation" and "obstruction"—were created. In the year 1857, in consequence of the very elastic manner in which these last-named offences were liable to be, and had been, construed a statute was passed with the special object of defining and limiting their meaning.[1]

The position of Trades Unions between the year 1825 and the year 1871 was an equivocal one.

[1] 22 Vict. c. 34.

Though not prohibited by statute, they continued illegal at common law. Their members were often prosecuted for and convicted of conspiracy. They had no legal means of preserving or recovering their own property, indeed, had no legal right to obtain their own money from their own bankers. That these disqualifications were not confined to workmen's associations but extended to associations of masters also is shown by the leading case of *Hilton* v. *Eckersley*.[1]

A Royal Commission appointed in the year 1867 led to the passing of the Trades Union Act, 1871,[2] which, with the Amending Acts of 1876 and 1893,[3] now regulate the position and rights of these associations. The principal Act declares that "Trades Unions shall not be unlawful, so as to render any member liable to criminal prosecution for conspiracy on the ground merely that the objects of the Union are in restraint of trade," but the contracts between members, or between one Union and another, or for special disposition of their funds, are not to be enforced by the courts.

Any seven or more persons by subscribing their names to rules may now be registered as a Trades Union, but if any one purpose for which the Union is founded is unlawful the registration is void. The property of the Union is to be vested in trustees, who may sue and be sued in respect thereof, and may prosecute in respect of offences committed against it. The officers and agents of a Trades Union are now liable for misapplying its funds. Each Union must have a registered office, and

[1] 6 E. and B. 47. [2] 34 and 35 Vict. c. 31.
[3] 39 and 40 Vict. c. 22; 56 and 57 Vict. c. 2.

must make annual returns to the Registrar of Friendly Societies.

The definition of a Trades Union—as altered by the Amending Act of 1876—is the following: "Trades Union means any combination, temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not (if the principal Act had not been passed) have been deemed to be an unlawful combination, by reason of some one or more of its purposes being in restraint of trade."

At the same time that the Trades Union Act of 1871 was passed, there was also enacted the Criminal Law Amendment Act, 1871,[1] which declared certain specified acts, committed in furtherance of the objects of Trades Unions, to be illegal and criminal.

### *Breach of Contract by Workmen.*

Intimately, indeed inseparably, connected with the legal position of Trades Unions is the question of the legal consequences formerly attaching to the breach on the part of a workman of his contract with his master, in the making of which he was permitted so small a share. At the commencement of the 19th century the Act of the twentieth year of Geo. II. (cap. 19) was still in force.

By this Act, the Justices of the Peace for their counties were to decide all disputes between masters and workmen arising out of their contracts of

[1] 34 and 35 Vict. c. 32.

service. A breach on the masters' part was punishable by damages, but a breach on the workman's part was a criminal offence punishable by imprisonment and flogging.

This Act has been spoken of, with somewhat grim humour, as the Act introducing the principle of arbitration between master and workman. By a statute passed in the year 1823[1] justices were given power to deal with, and to punish by imprisonment, breaches of contract on the part of workmen in refusing to enter into, or in quitting the master's service. Such was the state of the law until the year 1867. The remedy of a servant against his master was always a civil remedy, whilst that of the master against the servant was always of a criminal nature.

Until the year 1848 (Jervis' Act)[2] whilst masters upon complaint were brought before justices on summons, workmen were always brought before them on warrant, and until the year 1867 the proceedings took place in private.

The combined result of the statute and common law was that individual breach of contract by a workman was punishable by statute, concerted breach, either by statute or as a conspiracy.

In the year 1867 was passed the statute called 'Lord Elcho's Act,'[3] abolishing imprisonment for breach of contract, except in case of what was called aggravated breach of contract.

In the year 1874 a Royal Commission recommended that proceedings against workmen for breach of contract should be divested entirely of a penal character. The report made by this Commission

[1] 4 Geo. IV. c 34. [2] 11 and 12 Vict. c. 43.
[3] 30 and 31 Vict. c. 141.

led to the passing of the two statutes "The Employers and Workmen Act, 1875,"[1] and "The Conspiracy and Protection of Property Act, 1875,"[2] the first to regulate the civil, the second to regulate the criminal questions arising out of contracts of service, made between employers and employed—as they were therein for the first time called.

The former of these Acts gives jurisdiction to the County Courts, and a limited jurisdiction to Justices, in disputes between employers and workmen, but such proceedings were henceforth to be of a civil and not of a criminal nature; the second declares that an agreement or combination to do any act in furtherance of a trade dispute shall not render the person committing it indictable for conspiracy, if such act, committed by one person, would not be punishable as a crime.

These latter words may almost be described as "The Workmen's Charter of Liberty," for they dispose at once and for ever of the contention that a combination to do acts, not illegal in themselves, is entitled to be regarded by the law as a "conspiracy." There are two exceptions :

*First.*—Breach of contract having the effect, or likely to have the effect, of depriving the public of either gas or water.

*Second.*—Breach of contract which the workman has reasonable cause to believe will endanger life, or cause serious bodily injury, or endanger valuable property.

The specific offences of violence, intimidation, besetting, etc., are set out and carefully defined.

[1] 38 and 39 Vict. c. 90. [2] 38 and 39 Vict. c. 86.

Thus was secured to workmen after a long struggle the right of combination in protection or advancement of their interests, a legal recognition of their trade societies, and equality of contract. The statement of Mr. Disraeli—as he then was—at the Mansion House dinner, in the year 1875, contained more truth than does some post-prandial oratory when he said: "For the first time in the history of this country the employer and employed sit under equal laws."

The members of Trades Unions have since the decision of the House of Lords in *Allen* v. *Flood*[1] been further protected from civil liability in respect of their combinations, even where the motive prompting their acts is malicious, provided the acts themselves are not unlawful.

### *Truck System.*

I must now turn to another subject—viz., the changes in the law which have taken place respecting the payment of wages.

At the commencement of the 19th century the Truck System was in full vigour.

The word "truck" is a very old one, signifying to exchange or barter, and the truck system, as applied to labour, was one by which the master obtained the labour of his servants in exchange for goods or commodities, on which he generally secured a profit.

The statutes at present in force, by virtue of which the system has been almost entirely suppressed, are the Truck Act of 1831 and the amending Acts of 1887 and 1896, which may be cited together as "The

[1] (1898) A. C. 1.

Truck Acts, 1831 to 1896."[1] Probably some kind of truck system always existed, for the barter of labour in exchange for goods was no doubt an incident of the primitive relationship of master and servant as soon as labour became free. It was, however, in early times recognised that the system was unsound and liable to great abuse.

That as early as the 15th century it was abused, is clear from a statute of the year 1464 (4 Ed. IV. cap. 1), which may be called the first Truck Act. This Act recites, in quaint though forcible language, that:

> "Whereas before this time in the occupation of cloth making, the labourers thereof have been driven to take a great part of their wages in pins, girdles, and other unprofitable wares, under such price as stretcheth not to the extent of their lawful wages, it is ordained and established that every man and woman being cloth makers from the feast of St. Peter, 1465, shall pay to the labourers in the said trade lawful money, for all their lawful wages, and payment of the same."

Many other statutes to secure the same end were from time to time passed. Indeed, at the time of the passing of the Truck Act of 1831, the payment of wages otherwise than in cash had already been forbidden as to most industries.

The statute which stands immediately before the Truck Act of 1831[2] repeals eighteen previous Acts, or portions of Acts, passed to secure the payment of wages in money. These Acts had been easily evaded. The most usual mode adopted was for the employer

[1] 1 and 2 Wm. IV. c. 37; 45 and 46 Vict. c. 46; 59 and 60 Vict. c. 44.

[2] 1 and 2 Wm. IV. c. 36.

or someone in collusion with him to start shops or stores, called "tommy shops," at which the workmen were compelled, either by express contract or through fear of dismissal, to spend their wages. The prices charged by the tommy shops in comparison with the ordinary retail shops were enormously to the disadvantage of the workmen.

The articles forced upon workmen, either directly or indirectly, as wages were often of a paltry or useless description. In a case in the King's Bench in the year 1823, an inventory was put in of articles which a workman had been forced to accept as wages. It included: Calico, ribbon, cord, a hat, an umbrella, dimity, silk handkerchiefs, foreign watches, a tea chest, a brooch, a parasol, an old mourning pall, half a bushel of Dutch onions. The Truck Act of 1831 struck deeply at the root of this evil. In addition to declaring that any contract to pay an artificer in any manner other than in current coin of the realm shall be illegal, null, and void, and that the entire amount of his wages shall be paid to the artificer in current coin of the realm, it enacts, by sect. 2:

> "That if in any contract between employer and artificer any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the persons with whom, the whole or any part of the wages due or to become due, shall be laid out or expended, such contract shall be illegal, null, and void."

The widest meaning is given to the word "contract" in this connection. It is defined as including:

> "any agreement, understanding, device, contrivance, collusion, or arrangement on the sub-

ject of wages, whether written or oral, direct or indirect, to which the employer and artificer are assenting, or by which they are bound, or whereby either of them shall have endeavoured to impose an obligation on the other of them."

I have no time to speak of these Acts in detail. They contain provisions enabling the workman to recover wages not paid in money, and preventing the employer from recovering the price of goods supplied in contravention of the Acts. Penalties up to £100 are imposed for repeated offences.

Certain exceptions are allowed, provided the contract with reference to them is in writing, and the deduction does not exceed the real value of the articles supplied. Money may also be advanced for certain specified purposes, all of which are in the interest of the workman.

The term "artificer" used in the principal Act occasioned some difficulty. By the amending Act of 1887 the term "workman" for the purposes of the Truck Act now means a person to whom the Employers and Workmen Act, 1875, applies. This excludes domestic and menial servants, but, in substance, includes all workmen engaged in manual labour. Servants in husbandry—who were excluded by the Act of 1831—are now, by the present definition, within the Acts, but such servants are allowed to contract to receive food, drink (non-intoxicating), a cottage, or other allowances or privileges, in addition to money wages, as remuneration for their services.

The Acts now include the whole of the United Kingdom, and the duty of enforcing them has been placed upon the Inspectors of Factories and Mines.

### *Factory Legislation.*

If we turn again and consider the changes effected during the 19th century with respect to the conditions under which labour was carried on, we find a mass of remedial legislation.

To take factory legislation alone. The introduction of machinery at the the end of the 18th century had, as before stated, led to the abandonment of the domestic workshop, where the journeyman and apprentice worked side by side with the employer in his house, and to the springing up of large factories in many parts of the kingdom. The greed for wealth, encouraged by the comparative absence of skill now required in workmen, led to the employment of large numbers of women and children in insanitary and ill-ventilated buildings, under crowded conditions, and for long hours.

The Factory legislation (which culminated in the Consolidating Act of 1878) began in the year 1802. The first Factory Act of 1802[1] applied only to woollen mills and factories where apprentices or 20 workmen were employed. It recites that:

> "Whereas it hath of late become a practice to employ a great number of male and female apprentices, and other persons, in the same building; in consequence of which certain regulations are become necessary to preserve the health and morals of such apprentices and other persons."

It then provides for the cleansing, and the ventilation by means of windows, of such factories; for the supply of clothing to the apprentices, and their in-

[1] 42 Geo. III. c. 73.

struction in "reading, writing, and arithmetick or either of them" (*sic*!) and in the principles of the Christian religion. It also prohibited night work, or work for more than 12 hours a day in the case of children.

Several other Factory Acts were passed between this time and the year 1833. An Act of 1831[1] recites that it had become the custom in cotton factories to employ a large number of young persons of both sexes late at night, and in many instances all night.

In 1833 was passed by the efforts of Lord Ashley —afterwards Lord Shaftesbury, a Factory Act,[2] which applied to all factories—forbidding the employment of children under 9 years of age altogether (except in silk mills), limiting the hours of work to 9 hours a day for children between the age of 9 and 13 years; and prohibiting night work for young persons, *i.e.* persons under 18 years of age. From this date remedial legislation affecting labour in factories was passed every few years. I can do no more than just notice these statutes in passing.

In the Act of 1844 important advances were made.[3] A "factory" was defined as a place where machinery was used for the manufacturing purposes therein mentioned. The system of inspection by Government Inspectors was made effective, certifying surgeons (whose duty it was to give certificates in respect of the age of children, and their fitness for work) were appointed, and the first regulations made in regard to fencing dangerous machinery, and cleaning machinery whilst in motion; but these last regulations only applied in respect to the employment of children and young persons.

[1] 1 and 2 Wm. IV. c. 39. [2] 3 and 4 Wm. IV. c. 103.
[3] 7 and 8 Vict. c. 15.

The Act of 1844 allowed an Inspector to bring an action for damages on behalf of a workman injured by means of the machinery—a foreshadowing of our Employers' Liability Act. It also laid the foundation of what we now call the half-time system.

In 1850[1] and 1853[2] statutes were passed by which a uniform working day was fixed. Between 1861 and 1867 several statutes were passed bringing within the scope of the factory legislation many industries for carrying on which machinery might or might not be used. In the year 1867 was also passed the Workshop Regulation Act,[3] applying much of the beneficent legislation affecting children and young persons in factories, to workshops. "Workshop" was defined as any room or place whatsoever whether in the open air or not in which a child, young person, or woman is employed in any handicraft, and to which and over which the employer has right of access and control.

According to Mr. Redgrave, in his book on *Factories*, the Acts up to this date (1867) "embraced within their wide definitions nearly every trade and occupation in the country." In the year 1871,[4] workshops were placed under the control of the local authority for the purposes of enforcing the provisions of the Workshop Acts, and under the factory inspectors for the purposes of enforcing the Factory Acts. In the year 1874 the minimum age of employment was raised from 9 to 10 years.[5]

In the year 1875 a Royal Commission, having considered the whole of the statutes relating both

[1] 13 and 14 Vict. c. 54.
[2] 16 and 17 Vict. c. 104.
[3] 30 and 31 Vict. c. 146.
[4] 34 and 35 Vict. c. 104.
[5] 37 and 38 Vict. c. 44.

to factories and workshops, recommended their consolidation. This recommendation led to the passing of the Act of 1878,[1] which is still known as the Principal Factory and Workshops Act.

This Act, with the amending Acts of 1883,[2] 1889,[3] 1891,[4] 1895,[5] 1897,[6] compose the legislation now in force regulating the conditions of labour in factories and workshops, and may be cited as "The Factory Acts, 1878 to 1897." Together they form a wonderfully efficient code of law for the control and humane carrying on of this large branch of industry, being of general application and based on the sound principles deduced from the working of the earlier legislation.

I think it is a fairly exhaustive definition to say that at the present day, all places where for purposes of trade or gain any article is manufactured, altered, or adapted for sale, and where machinery driven by mechanical power is used in aid of such process or processes, are factories, as are also some industries named in the principal Act, viz., the places that were made factories by the repealed Acts of 1861 to 1867, whether machinery is used or not.

All like places not enumerated above where machinery is not used are "workshops."

Many factory regulations have also been applied to domestic workshops, *i.e.* places where trades are carried on under the family roof by members of the family only.

By the Factory Act of 1895[7] some important pro-

[1] 41 Vict. c. 16.
[2] 46 and 47 Vict. c. 53.
[3] 52 and 53 Vict. c. 62.
[4] 54 and 55 Vict. c. 75.
[5] 58 and 59 Vict. c. 37.
[6] 60 and 61 Vict. c. 58.
[7] 58 and 59 Vict. c. 37.

visions of the former Acts are applied to docks, wharves, quays, and warehouses, and to machinery and plant used in connection therewith, and to buildings above a certain height, or on which more than a certain number of workmen are employed.

The Acts, regarded as one, make careful regulations with respect to sanitary conditions, temperature, ventilation, escape from fire, overcrowding, fencing of mill gearing and dangerous machinery (not alone where children or young persons are employed, but in all cases). They also regulate the hours of labour, of overtime and night work, and provide for holidays and meal times.

The Secretary of State is given power to make special rules for dangerous trades or machinery, or to close dangerous factories or workshops, or to order the discontinuance of the use of dangerous machinery, under conditions as to arbitration in case of dispute. These powers are often exercised with beneficial results.

The minimum age at which employment may commence is fixed in the Principal Act at 11 years, but this question of age of employment is now regulated by the Education Acts.

By the Elementary Education Act of 1870,[1] the bye-laws made thereunder for enforcing school attendance, might partially exempt a child between the ages of 10 and 13 years from school attendance, if such child had passed the standard of education then in force applicable to his age.

In 1893 the minimum age at which such a certificate could be given was raised to 11 years,[2] and in 1899, by Robson's Act,[3] to 12 years. So that now,

[1] 33 and 34 Vict. c. 75. [2] 56 and 57 Vict. c. 51.
[3] 62 and 63 Vict. c. 13.

a child cannot work in a factory even as a half-timer until he is 12 years of age. But I must pass on.

### *Legislation Affecting Work in Mines.*

Turning from the conditions of labour above ground to those existing under ground, we encounter legislation of an equally remedial character applied to circumstances more loudly demanding it. The state of labour in mines in the early part of the 19th century can only be described as appalling.

Subject to no statutory restrictions, this important industry was carried on, particularly as regards women and children, under conditions involving the hardest and most demoralising labour. The hours of work were terribly long; children of both sexes, from five or six years of age, and sometimes earlier, were employed below ground, for from 11 to 14 hours a day. Both women and children worked under conditions fatal to health, in cuttings and seams generally less than three feet in height, drawing trucks of coal like animals, by means of chains fastened round their bodies.

A shocking part of the system of labour in mines was the apprenticeship system, by which the children of paupers, of both sexes, were apprenticed to butty-colliers—men who contract to get coal at so much per ton—to serve them without wages, from the age of five or six to the age of 21, and by whom they were often treated with great cruelty.

The mines themselves were terribly narrow and cramped, choked with fire-damp, impregnated with foul air, with no proper ventilation or sanitary arrangements. If you want a graphic picture of the

almost incredible hardships suffered by workers in mines even so late as the year 1840, read the speech of Lord Ashley as he then was, in introducing the first Mines Act of 1842,[1] founded on the report of the Royal Commission, which he was the means of getting appointed in the year 1840. You will find it in *Hansard*, vol. 63.

The Act of 1842 prohibited altogether the employment of females in mines underground, and of boys under 10 years of age. All apprenticeship deeds of females were declared void, and boys were no longer to be apprenticed to "butties" before they were 10 years of age, or for more than eight years.

In the year 1850[2] efficient provision was made for inspection of mines, and in the year 1855[3] general rules were laid down for the safe working of all mines, which formed the basis of the general rules now in force. In the year 1860[4] certain other mines were brought within the Coal Mines Acts, and the employment of boys under 12 years of age was forbidden, except as half-timers. In the year 1872[5] all the Acts were consolidated; certain descriptions of mines were brought under the consolidating Act; and all other mines were included within the Metalliferous Mines Act, which was passed in the same year.

The Metalliferous Mines Regulation Act, 1872,[6] with the Amendment Act of 1875,[7] are the Acts now in force regulating this class of mines. These Acts apply to metalliferous mines, in substance, all the provisions for ensuring safety and reasonable con-

[1] 5 and 6 Vict. c. 99.
[2] 13 and 14 Vict. c. 100.
[3] 18 and 19 Vict. c. 108.
[4] 23 and 24 Vict. c. 151.
[5] 35 and 36 Vict. c. 76.
[6] 35 and 36 Vict. c. 77.
[7] 38 and 39 Vict. c. 39.

ditions of working which then existed with respect to coal mines.

The Acts at present governing the working of coal mines are :

The Coal Mines Regulation Act, 1887 (the Principal Act), and the Amending Acts of 1894 and 1896, cited together as "The Coal Mines Regulation Acts, 1887 to 1896."[1]

They continue the prohibition of employment of females below ground, and raise the age of such employment in the case of boys to 12 years. They most stringently regulate the conditions of employment, both below and above ground, provide, by the system of check-weighing (the check-weigher to be appointed by the men), that the correct amount of coal raised shall be paid for ; prohibit single shafts ; make rules for the keeping correct plans of the mine and workings ; for notice of accidents, and judicial investigation as to their causes ; and for efficient inspection both by officials of the mine and by Government Inspectors. They also provide an elaborate set of general rules governing all mines, and require that every mine shall have "Special Rules" applicable to the circumstances existing in such mine. The manner in which the Acts and rules are to be brought to the notice of every workman engaged in the mine is also laid down.

It must be borne in mind that the Education Acts, which I mentioned in speaking of labour in factories, apply to and regulate the employment of children in mines as in other kinds of labour.

[1] 50 and 51 Vict. c. 58 ; 57 and 58 Vict. c. 52 ; 59 and 60 Vict. c. 43.

The last statute relating to mines is one passed last year[1] prohibiting altogether the employment of boys under 13 years of age in work underground in either coal or metalliferous mines.

### *Other Remedial Legislation.*

I have no time to do more than mention some other statutes of the 19th century directly affecting labour, the working of which has been attended with beneficial results. I may name :

The Chimney Sweepers' Acts[2]—legislation much demanded, again due to the philanthropy of Lord Ashley.

The Acts for the protection and amelioration of the condition of seamen, now codified in the Merchant Shipping Act, 1894.[3]

The Agricultural Gangs Act, 1867,[4] regulating the hiring of children and young persons by gangmasters—persons who formerly made large profits by engaging children and young persons with the object of farming out their labour in agriculture.

The statutes for regulating voluntary arbitration between masters and workmen, culminating in the Conciliation Act of 1896.[5]

The Poor Law Apprentices Act, 1851.[6]

[1] 63 and 64 Vict. c. 21.
[2] 3 and 4 Vict. c. 85 ; 27 and 28 Vict. c. 37 ; 38 and 39 Vict. c. 70.
[3] 57 and 58 Vict. c. 60.
[4] 30 and 31 Vict. c. 130.
[5] 59 and 60 Vict. c. 30.
[6] 14 and 15 Vict. c. 11.

The Payment of Wages in Public-houses Prohibition Act, 1883[1]—following the provisions of the Mines Acts, and prohibiting payment of wages to any workman in a place licensed for the sale of intoxicating liquors.

The Notice of Accidents Act, 1894,[2] requiring notice to be given to the Board of Trade, in many cases of accidents which occur in building and engineering work.

The Wages Attachment Abolition Act, 1870,[3] forbidding any court to attach the wages of a workman for debt. [I am not sure but that this Act is stultified by our procedure on judgment summons in the County Courts.]

The Explosives Act, 1875[4]; The Quarries Act, 1894;[5] both making regulations for the safety of the workmen engaged in these hazardous employments.

The Preferential Payments in Bankruptcy Act, 1888,[6] making wages of workmen preferential debts in bankruptcy, or in the liquidation of limited liability companies.

The Shop Hours Acts, 1892 to 1895,[7] regulating the hours of work in shops, and (what would our ancestors at the beginning of last century have said to it!) the Act of 1899,[8] passed to compel shopkeepers to provide seats for their female assistants.

[1] 46 and 47 Vict. c. 31.
[2] 57 and 58 Vict. c. 28.
[3] 33 and 34 Vict. c. 30.
[4] 38 Vict. c. 17.
[5] 57 and 58 Vict. c. 42.
[6] 51 and 52 Vict. c. 62.
[7] 55 and 56 Vict. c. 62; 58 Vict. c. 5.
[8] 62 and 63 Vict. c. 21.

*Employers' Liability for Accidents.*

The last subject to which I wish to refer is one with which you are all familiar—the comparatively recent legislation, imposing a duty on employers to compensate their workmen in cases of accident.

At the commencement of the last century, although owing to the absence of legal regulations accidents in the course of work were far more numerous than now, the whole of the consequences attending such events fell upon the injured workmen, and there was no legal resort against the employer.

Although the common law principle, that anyone exercising legal rights who negligently causes personal injury to another must make compensation for the injury, was at common law applicable to the relationship of master and workman, it would have been a bold workman who, as matters stood 100 years ago, ventured to sue his employer even in respect of his own personal negligence. Still less was the probability that the attempt should be made to engraft the principle expressed by the maxim, *Qui facit per alium facit per se*, on the relationship of master and servant. The principle of the employer's responsibility for the acts of his servants, acting within the general scope of their authority, has long been recognised (*Respondeat superior*); but it seems to have been assumed that there was a wide gulf between an employer's liability for his servant and a liability to him. This question was not so important in practice when the industries of the country were carried on upon a small scale; but the leaps and bounds by which the trade of the country increased, during the early part of the 19th century, brought about a complete change of system.

Huge industrial concerns, controlled by managers and overseers, rapidly sprang up, and later on corporations—where the employer is but an abstract personality—became recognised as a convenient form of carrying on business.

It was in the year 1837 that a butcher boy, with the temerity peculiar to his class, ventured for the first time to test the question, whether a master was liable to his servant for personal injury sustained at the hands of a fellow-servant. The case is known to you all, under the name of *Priestley* v. *Fowler*.[1] The plaintiff was promptly nonsuited by Lord Abinger, expressly upon the ground that the negligence relied upon to make the employer responsible was that of a fellow-servant.

Even the attempt to establish such a liability came as a shock to that very learned judge. If such actions were allowed (said he) where in the world would they end? "We should have a master liable to his servant for the negligence of the chambermaid, in putting him into a damp bed, for the negligence of the upholsterer in sending in a crazy bedstead whereby he was made to fall whilst asleep, for the negligence of the cook in not properly cleaning the saucepans, for that of the butcher in sending in bad meat, and for that of the builder who—by putting in bad foundations—caused the house to fall and bury master and servant together."

This case was followed and approved by Baron Alderson in the year 1850; and in 1858 in the case of the *Bartons-hill Coal Co.* v. *Reid*[2] the principle on which it was founded was firmly established by the House of Lords as part of the law of both England

[1] 3 M. and W. 1. [2] 3 M'Q. H. of L. Cas. 266.

and Scotland. Thus was established "the doctrine of common employment." This doctrine may be enunciated as follows:

> "Where the person suffering the personal injury, and the person causing it, are both workmen in the same employment, and having a common employer, such employer is not responsible for the consequences of the injury."

It has been defended upon the ground that a workman entering an employment, must be taken to have impliedly contracted with his employer to run the risks incident to that employment, including the risk of injury at the hands of his fellow-workmen.

By various decisions of our Courts this principle was pushed to great extremes. It was held to apply between workmen who had a common master, no matter how divergent their respective grades and duties might be, *ex. gr.* the general manager of a railway company was held to be in a common employment with a platelayer employed on the line, and a captain of a ship with one of the sailors serving under him, they both being in the service of the same shipping company.

The doctrine worked unfairly between different classes of employers, for the larger the firm the less was the liability, and corporations escaped entirely.

Notwithstanding the Employers' Liability Act of 1880, and the Workmen's Compensation Acts, 1897 and 1900, this doctrine of common employment still exists. By many persons besides workmen it has been denounced as both unsound in principle and unjust in application. The workmen complained of

it bitterly, and for years their Trades Unions kept up an incessant agitation for its repeal.

In the year 1877 a Select Committee of the House of Commons was appointed to consider the subject. This Committee would not go so far as to recommend that common employment should be abolished, but advised that an employer should be responsible for the negligence of persons to whom he delegated his rights of master over the workmen—called in the report "Vice-Masters."

This report led to the passing of the well-known measure, The Employers' Liability Act of 1880.[1] This Act, as you know, imposes liability upon an employer—

> For defects in the condition of his ways, works, machinery, and plant—if such defect is attributable to his negligence, or to the negligence of persons to whom he has delegated his duty.

Also—

> For the negligence of his superintendents and those to whom he has entrusted the duty of giving to the workmen orders or directions.

But the Act does not, save in these cases, and to a limited extent in the case of railway servants, abolish the doctrine of common employment.

The Act being a tentative one, other safeguards of the employer's interest are inserted. The amount of damages recoverable is defined, and limited to three years' wages. The actions are confined to the County Courts, and the conditions and procedure—as many a workman during the early stages of its

[1] 43 and 44 Vict. c. 42.

operation learned to his cost—are technical and embarrassing.

Still, with all its imperfections, this Act has proved a great boon to the working classes of the country.

It was decided, very shortly after the passing of the measure, in the case of *Griffiths* v. *Earl Dudley*,[1] that an employer may contract with his workmen that the Act shall not apply to their employment.

The classes of workmen to whom the Act applies are those designated in the Employers and Workmen Act, 1875, sect. 10. This definition clause excludes domestic and menial servants and seamen.

In the year 1895 a Bill was brought in by Mr. Asquith, then Home Secretary, which proposed to abolish common employment, remove technicality of procedure, and include within the term "workman" all persons engaged in manual labour, including seamen and domestic servants.

The Bill also gave the *coup de grace* to the doctrine of *Volenti non fit injuria* by the application of which a workman, knowing of a defect in his master's machinery, plant, or system, and continuing in the service, was held to have taken upon himself the risk of injury arising from such cause.

The application of this doctrine to the relationship of master and servant has, however, been much restricted by the decision of the House of Lords in the well-known case of *Smith* v. *Baker*.[2]

This Bill was lost on the much vexed question as to whether "contracting out" should or should not be allowed. So you see we have been near the alarming

[1] 9 Q. B. D. 357. [2] (1891) A. C. 325.

possibility contemplated by Lord Abinger of being liable for our cooks who fail to clean the saucepans.

In the year 1897 the Government took up the question of workmen's compensation for accidents on entirely new lines. The result has been the passing of the Workmen's Compensation Act, 1897,[1] an Act founded on the German system of compensation for accidents, although by no means identical with that system.

By this much abused and very radical Act, passed by a Conservative Government, the principle is assented to, not only that the employer should be liable for injury caused by fellow-workmen, but that he should pay compensation for every accident arising out of the work, whether caused by negligence or not.

The Workmen's Compensation Act is not substituted for any rights previously existing. The effect of the Act has been to make the present state of the law as to employers' liability most illogical.

This is the condition of things now existing :

> One part of the workmen of the country are more advantageously placed than any other members of the community, solely because they are workmen, whilst the other part are less advantageously placed and for the same reason.

The Act applies to some industries only, principally such as are generally supposed to involve hazardous risks.

Since the 1st of July, 1898, every workman employed on, in, or about a railway, factory, mine, quarry, or engineering work, or on, in, or about a

[1] 60 and 61 Vict. c. 37.

building, which exceeds 30 feet in height, which is being built or repaired by means of scaffolding or steam machinery, or being pulled down, is—if injured (no matter in what manner), entitled to receive compensation from the undertaker of the work. The undertaker is generally the employer, though not invariably so.

It is not necessary, as I have said, that the injury should be attributable to any negligence on the part of any one. In cases of death the compensation is recoverable by such relatives as are mentioned in the Fatal Accidents Act, 1845[1] (Lord Campbell's Act), if they were wholly or partially dependent on the wages of the deceased workman at the time of his death. The accident must arise "out of and in the course of the employment," and must not be attributable to the "serious and wilful misconduct" of the injured workman himself.

Difficulties have arisen in reference to what is a "factory" for the purposes of the Workmen's Compensation Act. We know that at present ships are not factories. Fancy a ship being a factory! and yet, owing to the wording of the Factory Act of 1895, and of the Compensation Act, it has narrowly escaped (if it can yet be said to have escaped), becoming one.

Chiefly owing to the ill-chosen and unscientific language used in the Act, the Court of Appeal, which has bestowed great care upon its interpretation, has felt compelled to give some decisions, strictly in accordance with the wording of the Act, though perhaps out of harmony with its commonly received intention.

[1] 9 and 10 Vict. c. 93.

Some of these decisions have lately been reversed in the House of Lords, which Supreme Court, construing the Act more in accordance with spirit than letter—perhaps also uninfluenced by apprehension of reversal—has felt able to cast aside the trammels which the form of drafting imposed upon a liberal construction.

Still, strange anomalies exist: The workman unloading goods on one side of a ship may be within the Act, whilst those unloading on the other side may be outside it; the workman, working inside a building, in course of erection, is not protected until the building is 30 feet high, and has got scaffolding up, and ceases to be protected when the scaffolding is taken down—and this although his duties have no reference to the height of the building or to the scaffolding. Whether or not, when taking down a building, he is outside the Act, as soon as such building is so far demolished as to be under thirty feet in height, will be a nice point for some one of you one day to argue.

The compensation given by the Act is roughly three years' wages in case of death, and half wages in cases of total incapacity, and something less for partial incapacity—to continue as long as the incapacity continues. This is the most serious part of the liability. The compensation is based on the workman's average weekly wages, but since the decision of the House of Lords in the case of *Lysons* v. *Knowles*[1] it is not necessary that the workman should have been two weeks in the same employment to enable him to get compensation.

Instead of action the procedure to recover com-

[1] (1901) A. C. 79.

pensation is by arbitration, but as the arbitrations are generally in the County Courts, and the procedure there is rather more technical than in the case of an action, this is a distinction without a difference.

Among the chief classes of workmen not included in the Act of 1897, we may mention workers in workshops (as distinguished from factories) sailors, domestic and menial servants, and workmen engaged in agriculture. This last named class, however, will not be outside the Act much longer. By the Workmen's Compensation Act of 1900,[1] all workmen employed in agriculture are, from and after the 1st of July next, to be within the scope of the principal Act.

This Act declares that from and after the above named date any employer, who habitually employs one or more workmen in agriculture shall in case any of them is injured be liable to pay the compensation given by the principal Act. The word "Agriculture" is to include, "horticulture, forestry, and the use of land for the purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit and vegetables." Henceforth it will be advisable, for such of you as employ gardeners, to insure against the liability unquestionably placed upon you by the new Act.

There is an odd clause in this Act that may lead to somewhat unexpected results:

> If a workman is employed mainly in agriculture, but occasionally in other work, the Act is to apply to the employment of the workman in such other work.

[1] 63 and 64 Vict. c. 22.

The result may be that if you send your gardener to market, and he is injured whilst going or returning—say in a railway accident—you will be liable to pay him compensation in respect of such injury.

That the principle on which the Workmen's Compensation Acts are based will at no great distance of time be extended, so as to include all industries, can hardly be doubted.

It has been said that an universal system of industrial insurance leads to an increase of accidents. Experience of the system in Germany, and the limited experience of the working of the Act in England, point somewhat in this direction, but it is yet far too early to speak with certainty on this point.

### *Summary of Legal Changes.*

I must now finish. I have endeavoured to point out only what may be called the radical changes in the law affecting labour which have taken place during the 19th century. The whole subject is an intensely interesting one, and will well repay any of you who care to follow it up more closely.

Just glance at the record :

Complete freedom on the part of workmen, both as to the disposal of their own labour and the terms on which they will dispose of it, has been secured.

Breach of contract—whether on the part of the employer or the workman—is now regulated by the same law and the same procedure, and all the criminal consequences formerly attaching to such breach, on the part of workmen, have been swept away, save only in cases where the consequences of the breach may involve what may be called "public danger."

Associations formed by workmen, with the objects of advancing or protecting their own interests, or the interests of their trade, are no longer regarded as conspiracies either by statute or common law, but, on the contrary, have acquired a legal status and legal protection.

The offences, commonly incident to the endeavour to induce a minority of workmen to abstain from work, or to fall into line with the views of the Trades Associations, are defined; and are all based upon some undue interference, by force or duress, with the free volition of those who are subject to such interference.

Whilst, largely owing to the removal of restrictions, the level of the rates of wages has risen considerably, both in respect of nominal value and (with the exception of rent in towns) of purchasing capacity[1] the law has effectually secured that payment of wages shall no longer be made in useless articles, but in money, and that the workman shall be free to lay out his wages to the best advantage.

The great industries of the country, at the commencement of the 19th century subject to no legislative restrictions, are now only allowed to be carried on subject to the adoption of almost every safeguard against danger which care and experience can suggest, and to the maintenance of all reasonable conditions for ensuring the health and comfort of the workers.

Lastly, when, notwithstanding legislative precautions, the accidents inseparable from a system of industry, carried on at high pressure and with keen competition, do occur, the claims of labour to receive compensation are fully recognised.

[1] See the *Report of the Royal Commission on Labour of* 1894.

All these changes, and many others, have been brought about during the past century, without social disturbance, and almost entirely without resort to illegal means, by the efforts of men both in the legislature and out—many of them, I am glad to say, members of our own profession—sufficiently philanthropic and far-sighted to perceive that the best interests of commerce and capital alike are secured by free labour under equal laws, and that labour should be protected by legislation in those matters only in which experience has shown that it is not yet strong enough to protect itself.

Surely such a record of the achievements of one century may be looked back upon with satisfaction, and regarded as the precursor of a still brighter future.

ALFRED HENRY RUEGG.

Conveyancing + Settled Land

## IX.

# CHANGES IN THE LAW OF REAL PROPERTY.

(Thursday, January 31st, 1901.)

THE two lectures which have been allotted to me cannot compete in point of interest with any of those entrusted to my colleagues. The subject is of the earth, earthy. It has not the tragic and human element of criminal law, nor the political flavour of Constitutional or International law. Mr. Blake Odgers and Mr. Birrell have, doubtless, had to struggle with unpromising subjects, but I have neither their charm of style nor their wit to assist me.

Moreover, the law of Real Property is still in a transition state, and most of the changes that have been made (with the exception of Lord Cairns's Settled Land Acts and Lord Halsbury's Land Transfer Act) are of the somewhat tinkering and patchy character so dear to the British Parliament. However, although the subject is not amusing, I will endeavour, as Lord Bacon sententiously puts it, "rather to excite your judgment briefly than to inform it tediously."

Now, although numerous changes have been made in the law affecting real estate during the past century, the most important may be broadly reduced to nine classes, viz., those relating to (1) settled land, (2) the capacity of persons under disability, (3) the effect of death on real estate, (4) the acquisition of title by long enjoyment, (5) copyholds and commons, (6) landlord and tenant, (7) the law of tithes, (8) the relation of legal and equitable rights, and, lastly, (9) changes in the forms by which property is made to pass from owner to owner—in other words, changes in the practice of Conveyancing.

I propose to commence with the most important of all, viz.,

### (1) *Changes in the Law of Settled Land.*

Land can be settled either by deed or will. Moreover, it can be settled in divers ways. People of moderate fortune usually settle land in trust for sale on the death of the first life tenant, the proceeds being divided among his children; or, instead of providing for its sale, they divide the property itself among the children. No essential change has been made in that form of settlement. But there is another and much more important form of settlement of land which has for its object the exact converse of the first. Instead of providing for an equal division of the land (or the proceeds of its sale) among a class of children, it aims at keeping the property intact as long as possible in the settlor's line of descendants, one male at a time having the exclusive possession of it during his life, and the eldest son of the settlor and the male heirs of his

body being preferred to the younger sons and their male issue. Such a form of settlement is called strict settlement. It rests on two foundations—primogeniture and estates for life. If primogeniture and the creation of life estates were forbidden, strict settlements would inevitably fall to the ground. As things stand, it is not too much to say that nearly all the great estates, comprising perhaps the greater part of the land of England, are held in strict settlement.

I have heard it said that a great Conveyancer of a past generation once annoyed the judges of the Common Pleas by commencing an argument with the definition of an estate in fee simple. Possibly some of you may feel equally annoyed with me if I venture to give a popular sketch of a strict settlement. But if some sages of the law have honoured me with their presence to-night, I expect that there are also some legal babes and sucklings of whom it is necessary to think.

Speaking broadly, then, the general framework of a strict settlement of land is as follows: The settlor conveys it to the use of himself for life, and after his death to the use that his widow may receive a rent charge (or jointure, as it is called). Subject to these life interests he gives it to the use of trustees for a long term of years (500 or 1000) upon trust to raise by mortgage of that term a specified sum of money for the portions of his younger children, and subject thereto to the use of his first and other sons successively and the heirs male of their bodies, with an ultimate remainder, in default of issue, to the settlor himself in fee simple.

It will be seen that, on the face of it, such a settle-

ment merely ties up the property during the settlor's life; for, upon his death his eldest son as first tenant in tail could (formerly by process called a common recovery and now by a simple enrolled deed) convert his estate tail into a fee simple, and by paying the portions of his younger brothers and sisters, make himself the absolute owner of the property.

There is no certain method of avoiding this, because the law does not permit property to be settled by way of remainder on the unborn child of an unborn child,[1] or by way of trust or executory limitation beyond a life or lives in being and twenty-one years afterwards.[2]

In practice, however, the property is rarely permitted to go out of settlement, for directly an eldest son comes of age he is induced, like some latter-day Esau, to sell his birthright for a financial mess of pottage.

The alternative is gently placed before him: do your duty to the family by surrendering your future estate tail, receiving instead a future life estate and a present handsome allowance, or remain during your father's lifetime without funds. Practically, even if family pride did not impel him to consent willingly, he would have to submit, because during his father's lifetime he can only convert his estate tail into a "base fee" which is scarcely negotiable for purposes of mortgage. He therefore yields; he and his father disentail the property, and then resettle it, restoring the father's life estate, giving a life estate to the son on the father's death, and an estate in tail male to *his* sons succes-

[1] *Whitby* v. *Mitchell*, 44 Ch. D. 85.
[2] *Cadell* v. *Palmer*: Tudor's L. C. Conveyancing, 578.

sively. When he marries and *his* eldest son comes of age, the same ingenious process is repeated.

The system of strict settlement, in short, depends upon providing by means of constant resettlements, that no person of full age shall be entitled to a greater estate than an estate for life. This is the keystone of the edifice, and consequently the law of strict settlement is, apart from powers contained in the settlement itself, identical with the law relating to life estates.

Now, with these explanatory remarks let us contrast the state of settled land at the beginning and end of the 19th century.

At the beginning, unless the will or settlement by which the property was settled contained express powers (which was frequently not the case), a tenant for life could neither sell, exchange, nor partition the settled property, however desirable it might be. If the estate consisted of a large tract of poor country, fruitful in dignity but scanty in rent, and especially if the portions of younger children charged on it were heavy, he too often found it a *damnosa hæreditas;* the rents, after payment of interest on the portions, leaving a mere pittance for the unfortunate life tenant to live on, and quite disabling him from making improvements, or even keeping the property in a decent state of repair. Nay, more, if he did spend money in improvements, the money was sunk in the estate to the detriment of his younger children. He could not pull down the mansion house, however old or inconvenient it might be, nor even, strictly, make any substantial alteration in it. Unless expressly made unimpeachable for waste, he could not open new mines.

But in addition to these disabilities, what pressed still more hardly upon him, and on the development of the estate generally, was his inability to make long leases. Consequently where valuable minerals lay beneath a settled property, or the growth of the neighbouring town made it ripe for building sites (the rents for which would greatly exceed the agricultural rent) nothing could lawfully be done. The tenant for life could not open mines himself, even if he had the necessary capital for working them; nor, even if unimpeachable for waste, could he grant leases of them to others for a term which would repay the lessees for the necessary expenditure in pits and plant; nor could he grant building leases or sell for building purposes at fee farm rents. In some settlements powers were expressly inserted, enabling the trustees to grant such leases and to sell, exchange, and partition. But frequently, especially in wills, such powers were omitted, and in such cases the only means of doing justice to the land, was to apply for a private Act of Parliament authorising the trustees or the life tenant to sell, exchange, partition, or lease. But such Acts were expensive luxuries, only open to the rich, and beyond the means of most country gentlemen of moderate means. Moreover, even the barring of the entail, in order to make a new or more effectual settlement, necessitated the grotesque and cumbrous proceeding known as a common recovery, a pretended action by a collusive plaintiff against the tenant in tail, for the recovery of the land. The latter pleaded (quite untruly) that he had bought the lands from a man of straw (usually the Crier of the Court) who had warranted the title, and asked that this person should be "vouched to

warranty," *i.e.* called on to defend the action. The Crier being called, admitted the warranty, and made default. Thereupon judgment was given that the lands should be given up to the plaintiff, and that the Crier should convey lands of equal value to the tenant in tail under his fictitious warranty, which he was of course incapable of doing. What would have happened if the Crier had subsequently come into a fortune is too painful to contemplate. In some cases a single voucher was deemed sufficient; in others a double voucher was required. In all cases the proceeding was a scandalous farce, in which judges, counsel, solicitors, and the parties, were all behind the scenes and enjoying the fun. It was described by the Attorney General in 1833 as "involving enormous and unnecessary expense, and necessitating the conduct of proceedings through no less than twenty offices, in each of which danger, delay, and expense had to be faced."

Thus matters stood in the year 1801 and thus they continued down to the year 1833. In those days when agriculture was the most profitable of industries, when machinery and railways and steam navigation had not yet produced any great demand for coal and iron, and when towns did not as now overflow their ancient boundaries with astonishing rapidity, the tying up of land in the way I have described gave rise to but few hardships. Indeed, we find the Real Property Commissioners in 1829 singing a pæan over the system as one approaching perfection. In their first report they say: "Settlements bestow upon the present possessor of an estate, the benefits of ownership and secure the property to his posterity. The existing rule respecting perpetuities has happily hit the medium between

the strict entails which prevail in the northern part of the island, and by which the property is for ever abstracted from commerce, and the total prohibition of substitutions, and the excessive restrictions of the power of devising established in some countries on the Continent of Europe. In England families are preserved, and purchasers always find a supply of land in the market." That, however, was too optimistic a view, and even the Commissioners themselves recommended the abolition of the absurd method of barring estates tail by Common Recovery, and the substitution of a simple enrolled deed of conveyance, a recommendation which was carried into effect in 1833 by the Act for the abolition of Fines and Recoveries.[1]

However, even that measure did not pass without opposition, one argument being, I believe, that it would render useless the "lean and wasteful learning" on the subject which was then stored away in the brains of Conveyancing Counsel, a learning which Shakespeare with fine audacity attributes to no less a person than the Prince of Denmark when he says, "This fellow might be in's time a great buyer of land, with his statutes, his recognizances, *his fines*, *his double vouchers*, *his recoveries:* is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures?"[2]

Thus matters stood until the early years of the reign of that great and gracious Lady whose loss we are now lamenting. By the Drainage Acts,[3] tenants

[1] 3 and 4 Will. IV. c. 74. [2] *Hamlet*, Act V. sc. 1.
[3] 3 and 4 Vict. c. 55 and 8 and 9 Vict. c. 56.

for life and other limited owners, were empowered, with the leave of the Court of Chancery, to make permanent improvements in the way of drainage, and to charge the expenses with interest on the inheritance.

In 1864 still larger powers of improving land were given to tenants for life, by the Improvement of Land Act[1] of that year, which enables tenants for life with the sanction of the Enclosure Commissioners (now the Board of Agriculture) to raise money by way of rent charge for divers *specified* improvements, including draining, improvement of watercourses, embanking, enclosing, fencing, reclamation of land, the making of roads, tramways, railways, and canals, the cleaning of land, the erection and improvements of cottages and buildings, planting, the construction of piers, and other matters too numerous to mention in detail. To these were added by the Limited Owners Residences Acts, 1870[2] and 1871,[3] and the Limited Owners Reservoir and Water Supply Act, 1877, the erection or completion of, or an addition to a mansion house, and the construction of permanent waterworks.

These Acts were doubtless of great value, but they were of small importance compared with a statute passed in the year 1856 known as an Act to facilitate leases and sales of settled estates.[4] That Act after being amended by a series of statutes was repealed and the whole subject re-enacted in a modified form by the Settled Estates Act, 1877,[5] usually known to us as "Marten's Act" after its respected author, Sir Alfred Marten, the present Chairman of the Board of Studies of the Council of Legal Education.

[1] 27 and 28 Vict. c. 114.
[2] 33 and 34 Vict. c. 56.
[3] 34 and 35 Vict. c. 84.
[4] 19 and 20 Vict. c. 120.
[5] 40 and 41 Vict. c. 18.

The Settled Estates Acts enabled the Court of Chancery to sanction the sale, exchange, or partition of settled land and the granting of leases not exceeding in duration 21 years for an agricultural or occupation lease, 40 years for a mining lease or water-mill or water-way lease, 60 years for a repairing lease, or 99 years for a building lease, unless the Court should be satisfied that it was usual in the district and for the benefit of the property that longer leases should be granted.

They also authorised the tenant for life, without any leave of the Court, to grant leases not exceeding 21 years unless the settlement expressly negatived such power.

The Settled Estates Acts governed the subject between 1856 and 1882. Under them a tenant for life, apart from express power in the settlement, could only sell or lease the settled land for longer than 21 years *under an order of the Court.*

For some time before 1882, an agitation had sprung up for the total prohibition of life estates. The late Mr. Joseph Kay, Q.C., was perhaps the ablest advocate of the reformers, and wrote a very able and interesting book on the subject called *Free Trade in Land.* It was there urged that life estates complicate titles and make transfers difficult and costly; that they take the control of children (particularly an eldest son) out of his father's hands, and prevent "the sale and breaking up of the great estates when change of circumstances, or poverty, or misfortune, or bad management, or immorality would otherwise bring land into the market."

On the other hand, we of a conservative disposition (I say we, for I took an active part in the con-

troversy) pointed out, that if settlements of personal property were allowed, but settlements of land were forbidden, it would be a terrible injustice to landowners. As the late Mr. Osborne Morgan put it, "It is scarcely too much to say, that to a good many people a proposal to abolish marriage settlements would be little less startling than a proposal to abolish marriage itself. Even grandfathers have their feelings, nor are fathers or husbands always to be trusted; and few country gentlemen would regard with complacency a measure of law reform which might in certain eventualities, consign their daughters or their daughters' offspring to the workhouse or the streets. A law, therefore, which would permit no limitation of land, except, in fee simple would render, it very difficult for a landowner to make a suitable provision for his family after his death. Under such a law, a country gentleman could not give a life interest nor a jointure to his widow, he could not make a proper provision for the event of one or more of his children dying under age. He could certainly not protect his daughters or their issue against the rapacity or extravagance of an unprincipled or thriftless husband or father. It is easy to see that such a measure, simple as it sounds, would amount to a social revolution; its consequences would be absolutely incalculable."

Under these circumstances some of us urged that instead of rashly abolishing life estates, an extension of powers of management and sale should be granted to life tenants; and this idea having commended itself to the late Earl Cairns and others, including that great real property lawyer, Mr. Wolstenholme, a Bill was drafted by the latter, and safely piloted

through Parliament by the former, and is now known as the Settled Land Act, 1882.[1] It is impossible, having regard to the time at my disposal to give more than the merest sketch of the provisions of this great Act, the greatest real property Act, I think, of the century.

The broad policy on which the Act of 1882 is founded, was, in the words of the late Lord Justice Chitty in *re* Mundy and Roper (reported in 1899, 1 Ch. p. 288.), as follows : "The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of fetters imposed by settlement ; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with it by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale, by shifting the settlement from the land to the purchase money, which has to be paid into Court or into the hands of trustees" (at the option of the tenant for life).

The money so paid can be applied in a variety of ways for the extension of the property or the release of incumbrances; or can be invested upon

[1] 45 and 46 Vict. c. 38.

certain specified securities, according to the direction of the tenant for life, or may be applied in the execution of permanent improvements, a long list of which is inserted in the Act. The Act also contains elaborate clauses providing for the working out of the general idea, and, speaking broadly, may be said to give a tenant for life or other limited owner, powers of management as large and varied as those of an absolute owner, but making provision for safeguarding capital money arising from the settled land, so that it cannot be either pocketed or wasted by the tenant for life.

The following salient points should be noted :

(1) The tenant for life in possession—the head of the family for the time being—the man most interested in the prosperity of the property, is the person in whom the statutory powers of selling, leasing, and improving are inalienably vested. The powers are not confided to independent trustees, who would naturally take a languid and platonic view of the situation. It is this provision which is the life-blood of the Act.

(2) The life tenant cannot part with his statutory powers, even although he parts with his life estate; but in that case, if he exercises the powers, they are without prejudice to the estate *per autre vie* of his assignee.

(3) Except in the case of the mansion house, or its demesne lands, or of heirlooms, the tenant for life is not fettered by the necessity of obtaining the consent either of the Court or of the trustees. True, he has to give notice to the trustees of his intention to exercise his statutory power; but that is merely to enable them to keep an eye upon him, so that, if he

should attempt to use his powers fraudulently, they may apply to the Court to stop him.

(4) As to improvements, the Act provides (sec. 29) that every limited owner may, without impeachment of waste, execute any improvement specified in section 25, or inspect, repair, or maintain it, and for these purposes may do all acts proper for the execution, maintenance, repair, and use thereof, and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

(5) With regard to leases, the tenant for life is empowered to grant building leases for 99 years, mining leases for 60 years, and other leases for 21 years, subject to certain formalities, and at the best procurable rent. Moreover, where it is shown to the Court that it is the custom of the district to lease for building or mining purposes for a longer term or on other conditions than those specified, or even in perpetuity, and that it is difficult to get a tenant except on the local terms, the Court may authorise leases in conformity with such custom.

(6) In connection with sales or building leases, the tenant for life may cause any part of the land to be appropriated for streets, squares, gardens, and open spaces.

(7) In the case of mining leases, as the property necessarily depreciates as the minerals are abstracted, the Act provides that where a mining lease is made, whether of opened or unopened mines, there shall be set aside as capital money under the Act, three-

quarters of the rent if the tenant is impeachable for waste, and one-quarter if he is not.

Lastly, any prohibition of the powers of the Act contained in any settlement is to be absolutely void.

Such is a rough sketch of this great Act, an Act which has been, in my opinion, a complete success.

There have been several Acts amending the Act of 1882, but they have only dealt with detail, and in nowise affect the broad principles on which the main Act was founded.

In addition to this great statute, the past century has seen a considerable number of minor changes in the law of settled land. For instance, take the case of contingent remainders, words of fear almost as unwelcome to the ear of the student as the note of the cuckoo is said by Shakespeare to be to that of the husband.

In the year 1801, if real estate was settled upon A for life, and after his death to such of his children as should attain 21, then, if A's life estate came to an end before any of his children attained 21 years of age, the gift to the children failed. The rule was that a contingent remainder must become vested at or before the determination of the preceding estate of freehold, otherwise it was void. It was immaterial how the preceding estate of freehold came to an end, whether by forfeiture, surrender, merger, or by the death of the life tenant. To prevent this, it was usual to go through the form of appointing trustees to preserve contingent remainders (a pure technicality—as pure a technicality as fines and recoveries). On the other hand, where a contingent interest in land was limited by way of executory devise, it did not fail by reason of the preceding estate coming to an end before the

contingency became a certainty. This absurd distinction, depending entirely on logical deductions from feudal notions, has gradually been abolished. In 1845, by the 8th section of the Real Property Act of that year,[1] it was enacted that henceforth no contingent remainder should fail by reason of the determination of the preceding estate by forfeiture, surrender, or merger. The author of this Act, however, curiously enough, still left a contingent remainder liable to be defeated by the death of the preceding life tenant before the contingency had become a certainty, and the law so continued until 1877. In that year, in consequence of the very hard case of *Cunliffe* v. *Brancker*[2] (where a whole family of children were deprived of property, because an unskilful draftsman had not given trustees of a will a sufficient legal estate to preserve the centingent remainder), an Act was passed, called the Contingent Remainders Act.[3] By this Act the liability of contingent remainders to destruction by the natural expiration of the preceding estate has been practically abolished with regard to remainders arising under instruments executed since the 2nd August, 1877. No one, I think, can doubt the wisdom and justice of this.

Another point on which the law of settled land has been changed in the direction of freedom is with regard to accumulations. In the beginning of the year 1800 the rule against perpetuities (afterwards authoritively declared in *Cadell* v. *Palmer*[4]) was doubtless in force, but it nevertheless permitted the income of real or personal estate to be accumulated

[1] 8 and 9 Vict. c. 106. [2] 3 Ch. D. 393.
[3] 40 and 41 Vict. c. 33.
[4] *Tudor's Leading Cases in Conveyancing*, 578.

during the whole of the period of lives in being and 21 years afterwards. A certain eccentric Mr. Thelluson, taking advantage of this, successfully directed that the income of all his real estate should be accumulated during the life of the survivor of his descendants living at his death, for the benefit of his remote descendants. This created such an impression that an Act was passed in July 1800, commonly called the Thelluson Act,[1] thereby conferring an immortality on the testator which he did not merit. By this Act, accumulations are prohibited for longer than four alternative periods, viz., the life of the settlor, or 21 years from his death, or during the minority of any person living at his death, or during the minority of any person who, if of full age, would be entitled to the income. These restrictions have been tightened by the Accumulations Act, 1892, which prohibits accumulations *for the purpose of purchasing land* for a longer period than the minority of the person who, if of full age would be entitled to receive the income directed to be accumulated.

So much with regard to the changes in the law of settled land. Much still remains to be done to place our law of settled property on a rational basis. For instance, learned members of the legislature might well turn their attention to the law relating to repairs of settled land, which is in a most confused and absurd state. The law, according to a decision of the late Mr. Justice (afterwards Lord Justice) Kay, in *re* Cartwright,[2] is that a legal life tenant is not liable to keep in repair freehold lands or houses. The same rule also apparently applies to an equitable life

[1] 39 and 40 Geo. III. c. 98. [2] 41 Ch. D. 532.

tenant.[1] Nor has the Court any jurisdiction, where the estates are legal estates, to order money to be raised on the security of the corpus for making repairs,[2] although there appears to be such jurisdiction where the property is vested in trustees. Surely this is a very irrational and thoroughly impolitic state of the law. Either the life tenant ought to be made to keep property in repair, or the Court ought to have jurisdiction in every case to sanction a charge for the purpose on the inheritance. Something ought to be done to clear away an *impasse* which is a disgrace to our law.

I know of an estate where the present life tenant, an old man, is allowing all the farm-houses, cottages, and buildings to go into absolute ruin, roofs have fallen in, fences and gates are broken, and the whole estate given over to decay, yet the remainderman has no remedy.

(2) *Changes in the law relating to the real estate of persons under disability.*

I now come to another branch of our subject, viz. changes in relation to disability, including the power of dealing with property on behalf of persons under disability.

In the year 1801 a married woman entitled to land for a legal estate in fee simple could not sell, mortgage, or deal with it in any way, either with or without the joinder of her husband, except by going to the outrageous expense of suffering a fine—a collusive action, which, like a common recovery, necessitated

[1] *Re Courtier*, 34 Ch. D. 136.
[2] *Re de Teissier*, (1893) 1 Ch. 153.

the carriage of the business through a multitude of Government offices, in each of which, I need scarcely say, fees were extracted. She could not make a will of her fee simple lands. She could not even release her contingent right to dower on a sale by her husband of his own lands, without suffering a fine. It was at that date also considered to be very doubtful whether she could deal with the fee simple where it was settled to her separate use, the prevailing view being that the separate use was confined to her life interest and could not affect her heir.

By the Fines and Recoveries Abolition Act, 1833,[1] however, her position was to some extent improved, and she was enabled to dispose of her fee simple lands by a deed with the approbation of her husband, and acknowledged by her to be her free act before Commissioners. That, of course, only cheapened matters.

In 1865 it was decided, in the case of *Taylor* v. *Meads*,[2] that a married woman could without these formalities dispose by deed or will of fee simple lands settled *to her separate use*; but it was not until 1870 that any fresh legislation came to the relief of married women. In that year the first Married Women's Property Act[3] was passed; but, so far as real estate is concerned, it only made statutory separate property of the *rents and profits* of real estates descending to a married woman as heiress. In 1882, however, Parliament passed a thoroughly revolutionary Married Women's Property Act,[4] which, like many statutes of importance, did not attract one quarter the interest evoked by a burials bill or a

[1] 3 and 4 Will. IV. c. 74.
[2] 34 L. J. Ch. 203.
[3] 33 and 34 Vict. c. 93.
[4] 45 and 46 Vict. c. 75.

verminous persons bill or other measure interfering but little with the people's everyday life. The general effect of this bill has been (so far as women married after the Act came into force are concerned) to put them in the same position as men, and even to put women married before the Act into the same position so far as regards property their title to which first accrued after the Act. Thus married women, from a position of complete proprietory subjection at the commencement of the century, have attained complete proprietory equality with men at the end of it. Nay, their position is even better than that of men; for if they are, by will or settlement, expressly restrained from alienation, they can snap their fingers at their creditors; and while their husbands are denied all participation in their worldly possessions, they (the husbands) still remain liable to third parties for their spouses' torts. But the privileges of the fair sex do not stop here, for while they can use restraint against alienation as a shield against their unfortunate creditors, the 39th section of the Conveyancing and Law of Property Act, 1881, enables a sympathetic judge to relieve them of it if it should prove irksome and contrary to their true interests. As has been happily written by a legal poet, Mr. Cyprian Williams:

> "Surely e'en the host angelic can afford no happier station
> Than the wife who has an income with restraint on alienation." [1]

So far married women. Let as now turn to infants, legal infants, *i.e.* persons under the age of twenty-one years.

In 1801 it was impossible to sell an infant's real estate (with a qualified exception in the case of gavel-

[1] *Lyrics of Lincoln's Inn.*

kind lands) however desirable a sale might be. Even the Court had no inherent jurisdiction to order a sale, nor to authorise a settlement by an infant of his or her property on marriage. Nor was it possible to grant leases binding on the infant. It was impossible to spend money on the estate or to develop it in any way. If strict settlement was sometimes disastrous to a locality, still more so was a long minority. How different is the case now. By 1 William IV. c. 65 the guardian was empowered by the direction of the Court of Chancery to make ordinary mining or building leases of the infant's land for any term. By the Infants' Settlement Act, 1855,[1] a male infant of 20 and a female of 17 were enabled to make a binding settlement on marriage with the sanction of the Court. The Partition Acts, 1868 and 1876,[2] enabled the Court in a partition action where an infant is interested to order a sale and to vest the property in the purchaser.

The Settled Estates Act, 1877,[3] empowered the Court to order a sale, where an infant was interested in *settled land*. This did not affect infants entitled in *fee simple* in possession, but by the 41st section of the Conveyancing and Law of Property Act, 1881,[4] it was extended to fee simple estates.

By the 42nd section of the last-mentioned Act provision is made for the exercise by trustees appointed on behalf of an infant of very wide powers of management, including the carrying out of repairs, the working of mines, and so on.

Finally, by the 59th and 60th section of the

[1] 18 and 19 Vict. c. 43.
[2] 31 and 32 Vict. c. 40 and 39 and 40 Vict. c. 17.
[3] 40 and 41 Vict. c. 18. [4] 44 and 45 Vict. c. 41.

Settled Land Act, 1882, the Court is empowered to appoint persons to exercise on behalf of an infant (whether tenant for life, in tail, or in fee) all the powers of sale, partition, exchange, and leasing given by that Act to tenants for life.

The old lawyers generally classified infants, lunatics, and married women together in a rising scale of intelligence. It remains to consider the positions of lunatics.

The Statute de Prœrogativa Regis,[1] provided that the King should have the custody of the lands of idiots, subject to his supplying the idiot with necessaries, and returning his lands to his heir at death. It took, however, a fine distinction between idiots and lunatics, providing that with regard to the latter, the King should see that their households were competently maintained out of the rents and profits, any surplus being kept for their use on recovery, or, if they died, distributed for the good of their souls by the advice of the ordinary.

The lunatic, therefore, was in a better position than the idiot, inasmuch as the King appropriated the income of the one, but merely held it as trustee for the other. Moreover, the soul of the lunatic was provided for, while the idiot passed away "unhousel'd, disappointed, unanel'd." This distinction has for centuries been abolished, but it was not until 1853 that powers of sale, leasing, and so on were conferred on the Lord Chancellor in respect of the estates of persons *non compos mentis*. The subject is now governed by the Lunacy Act, 1890,[2] which confers on the Masters in Lunacy powers to sell, mortgage, improve, and lease the lunatic's real estate.

[1] 17 Ed. II. cc. 9 and 10. [2] 53 Vict. c. 5.

### (3) *Changes in the law relating to the effect of death on real estate.*

Let us now turn to the changes in the law relating to the effect of the death of an owner in fee simple. And first as to changes in the law of devolution.

In 1801, if a man died solely seised of real estate in fee simple, his widow was entitled to one-third of it during her life, and of this he could not deprive her either by will or deed, not even by a sale or mortgage of the land. The only method of doing it was by levying a fine with all its delay and cost. This "rusty curb of old Father Antic, the law," was destroyed by the Dower Act, 1833[1], and now a widow can only claim dower on lands belonging to her husband at his death, and only then with regard to lands which he has not disposed of by his will.

In 1890, however, Parliament gave to certain widows, viz., the widows of persons who die intestate and without issue, a further first charge for £500 payable rateably out of the real and personal estate of the deceased. This Act, called "The Intestates Estates Act, 1890,"[2] was the result of several shocking cases where a man having made no will, all his real estate and half his personalty had passed to remote cousins, leaving the widow penniless, or nearly so.

With regard to heirship, at the beginning of the 19th century the matter was governed by a series of rules depending on custom and digested by Lord Hale. Ascendants in the direct line were never admitted. For instance, if a man died intestate, leaving a father and an uncle, the uncle took to the exclusion of the father, on the childish ground that

[1] 3 and 4 Will. IV. c. 105. [2] 53 and 54 Vict. c. 29.

the law presumed that a man got his estate from his ancestors, and that consequently his father must have enjoyed it already. Moreover, half blood was not recognised as giving any right of heirship, and descent was traced from the last person seised. By the Inheritance Act, 1833,[1] the matter was codified, descent was thenceforward traced from the last purchaser instead of the last person seised, lineal ancestry were admitted as heirs (although the mother was placed very low down in the list) and the half blood were admitted on fair terms. Finally by the Land Transfer Act, 1897, freehold land now devolves in the first instance on the personal representative in the same manner as leasehold property; but, subject to debts funeral and testamentary expenses, he holds it in trust for the heir or devisee.

But in addition to succession, the effect of death on the liability of real estate to answer the debts of the deceased has been very considerably altered during the past century.

In 1801 the only property of a deceased person recognised as liable for simple contract debts, was the general personal estate. Unless he *charged* his debts on his real estate, the heir or devisee took it free from all debts except mortgage debts, crown debts, judgments and recognizances and debts arising under deeds *in which the heir was expressly mentioned*, and not even for such debts if the debtor devised the property to another.

Even in the case of mortgage debts, the heir or devisee, with gross unfairness, was entitled to be indemnified out of the general personal estate of the deceased.

[1] 3 and 4 Will. IV. c. 106.

This was a scandalous state of the law according to modern notions, and by various statutes, especially by 3 and 4 Will. IV. c. 104, and 32 and 33 Vict. c. 46, real estate has been made available for payment of debts of all kinds, and debts arising under deeds have not even priority over simple contract ones. Moreover, by the Acts known as Locke King's Acts,[1] where an heir or devisee takes real estate burdened with a mortgage debt or lien, he is to take it *cum onere*, and is to be no longer entitled to saddle the burden on the personal estate of the deceased—a very excellent extension of the maxim *qui sensit commodum debet sentire et onus.*

It sometimes happened, however, before these beneficial changes were introduced, that an honest testator charged his real estate with debts by his will, but omitted to give any directions as to how the charge was to be enforced. The executor could not enforce it, for the lands did not vest in him. Even if the real estate was given to trustees they could not sell or mortgage it to raise the charge, unless express directions were given to them to do so; and consequently a Chancery suit was in such cases inevitable. In 1859, however, Parliament passed the Law of Property Amendment Act of that year, which empowered a "devisee in trust" of real estate charged with debts, to raise the sum required by sale or mortgage; and if there were no devisees in trust, then a like power was given to the executors.[2] However, this Act only applied where the will contained a charge of debts, and in other cases a Chancery suit was necessary in order to get real estate sold for payment of

[1] 17 and 18 Vict. c. 113, 30 and 31 Vict. c. 69, and 40 and 41 Vict. c. 34.

[2] 22 and 23 Vict. c. 35.

them. But now, by the Land Transfer Act, 1897, freehold land always devolves on the personal representative, and he is given full power to sell or mortgage it for payment of debts whether expressly charged or not.

While on this subject, I may mention that there was no death duty levied on real estate until 1854, when succession duty was imposed; and now by the Finance Act, 1894, estate duty is added.

### (4) *Changes in the Law relating to Limitation and Prescription.*

So much for changes in the law relating to the acquisition of property by succession. Let us now turn to acquisition by what Continental jurists would call prescription. I say Continental jurists, because English lawyers usually restrict the term prescription to the acquisition, by long user, of easements and profits *a prendre in alieno solo*; whereas on the Continent, it includes, with better logic, the acquisition of corporeal property by long user under what we call the statutes of limitation.

What was the state of the law as to acquisition by long user at the commencement of the 19th century?

With regard to corporeal hereditaments, the question was practically governed by[1] the Statute 32 Hy. VIII. c. 2, by which an undisturbed possession as of right for at least 60 years, was required to bar real actions and writs of right.

This state of the law lasted down to 1833, when the

[1] No doubt the Limitation Act, 1623, limited the right to bring an action of ejectment to 20 years, but it did not prevent real actions or writs of right being brought within 60.

celebrated Statute of Limitations of that year was passed.[1] The general result of that Act was as follows :

(1) The period was reduced from 60 to 20 years.

(2) Where a rightful owner *sui juris* is out of possession, without acknowledgment of his title signed by the party in possession, for 20 years, the Act not only takes away the legal *remedies* for recovery of possession, but also abolishes his *right* to the property; so that even if he should recover possession without the aid of the Courts, he would be a trespasser.

(3) The Act made exceptions in favour of persons under disability, and persons beyond the seas, who were to have ten years from the cessor of their disability or return to England in which to assert their rights.

(4) It also provided that the statutory period should not begin to run against persons entitled to future estates or interests until those estates or interests became actually enjoyable in possession.

That was the broad general result of the Act of 1833. In 1874 a new Limitation Act was passed,[2] the effect of which was to substitute 12 for 20 years and 6 for the extra 10 allowed to persons under disability, and to take away altogether the exception in favour of persons beyond the seas. Truly a world which was vast in 1833 when ocean steam navigation and telegraphs were unknown, has become so contracted by those great inventions as to make absence beyond the seas little more of a true disability than absence in the Hebrides was in 1833. The rights of future owners are also abridged by the

[1] 3 and 4 Will. IV. c. 27. [2] 37 and 38 Vict. c. 57.

Act of 1874, so that now a reversioner is only allowed 12 years from the time when the previous owner was dispossessed, or six years from the time when he himself became entitled in possession, whichever period may be the longest. Moreover, if the right of one reversioner is once barred, the bar is now made to extend to all subsequent reversioners.

Now, let us turn to the similar but more complex questions in relation to easements and *profits à prendre*. By the ancient Common Law, an easement or profit, could not be gained by long user. Then, probably in the reign of the third Edward, the Courts, on the analogy of the first Limitation Act,[1] laid it down that easements and profits might be gained by mere user traced back as far as 1189 (the first year of the reign of Richard I.). Then (as time progressed and it became impossible to trace back to that date) it was held that user during the memory of living witnesses was sufficient to raise a *prima facie* case, rebuttable by proof that the user first arose since 1189; by showing, for instance, that both the dominant and servient tenement were owned by the same person at sometime during that period. To meet this, the fiction of a modern lost grant was invented by the Courts, and juries were directed by judges to presume a lost grant where 20 years user was shown. But this fiction still left it open to the owner of the land to rebut the right claimed, by showing that it could not have arisen by grant at all. Thus matters stood at the commencement of the past century.

This fiction, which imposed on juries the finding of a lost grant in which they probably had not the

[1] 3 Ed. I. c. 39.

least belief, so shocked Lord Tenterden, that he prepared and piloted through Parliament the Statute know as the Prescription Act, 1833.[1] It must, I think, be called an ill-conceived Act, because it leaves it uncertain, even at the present day, whether it relates to all easements, or only to those specifically mentioned; and moreover, it makes time in some cases operate against the owners of future estates (as in the case of easements of light), and not in other cases. It specifies 20 years as the period in some cases, and 30 in others. It did not touch rights in gross, nor *profits à prendre* except common rights, and it is very doubtful whether it touched easements of support at all. In short, this Act and the statutes of limitation might well be reconsidered in the light of modern decisions, and a new code, dealing with both subjects on one basis, will, let us hope, be one of the great statutes of the new century. It is absurd that while 12 years possession should give a right to land, at least 20 should be required to give a right of way over land, that 30 should be required to give a right of common, and that even the testimony of living witnesses should only confer a *prima facie* right to a fishery or any other profit *in alieno solo*.

Since the Judicature Act, the theory of a lost grant has been considerably extended in cases of profits not falling within the Prescription Act. The old theory that a lost grant could be rebutted by showing that the right claimed was incapable of being granted at Common Law, has been modified to this extent, that if long enjoyment is shown, the Court will endeavour to presume a lost *lawful origin*, *legal or equitable*, even although the right claimed could

[1] 3 and 4 Will. IV. c. 71.

not have been *granted* at Common Law. Thus in *Goodman* v. *Corporation of Saltash*,[1] an equitable right in the inhabitants of Saltash as beneficiaries under a lost charitable trust to fish in the river Tamar was presumed from long user, although no Common Law grant of such a right could be made to a fluctuating body like the inhabitants. The great case of *Dalton* v. *Angus*,[2] too, has decided, but on what principle is doubtful, that even if the Prescription Act and the theory of lost grant are inapplicable to rights of support, yet a right to support to buildings is acquired somehow by twenty years' uninterrupted enjoyment. You see, therefore, that whereas in the year 1801 an easement or profit could only be gained by express grant, implied grant, or ancient prescription extending beyond the time of living memory (the implied grant or prescription being rebuttable), such rights may now also be gained as to some under the Prescription Act, and as to others under the new doctrine that a lawful (as distinguished from a legal) origin will be presumed from long user.

ARTHUR UNDERHILL.

[1] 7 App. Cas. 633. [2] 6 App. Cas. 740.

# X.

## CHANGES IN THE LAW OF REAL PROPERTY (*continued*).

(Thursday, February 7th, 1901.)

### (5) *Copyholds and Commons.*

I SHALL commence to-night's lecture with a brief account of the changes in the law relating to Copyholds and Commons.

I must remind you that copyholds are lands forming part of a manor, which have, in theory at all events, been holden from the lord from a period anterior to the statute *Quia Emptores* (1290), and were for many centuries held by the serfs and villeins of that lord as tenants at will. Gradually the Royal Courts came to recognise a custom, in all manors, of fixity of tenure, subject to the performance of services, and the payment of fines, fees, and heriots. So that, although copyholds are still formally described in all documents relating to them as held at the will of the lord, yet, since the time of Littleton,[1] Copyhold tenure has become little more than a very inconvenient form of ordinary tenure—an anachronism and a nuisance,

[1] *Temp.* Ed. IV.

and probably the greatest of all the obstacles to a simplification of the Land Laws. It has long ceased to be held by serfs and villeins, if for no other reason, because serfs and villeins themselves have for centuries ceased to exist. Indeed, it is not unusual nowadays to find that the copyholder is a person of far more social importance than the lord. I myself have known a case where the copyholder was a peer of the realm and the lord of the manor was the local ironmonger.

In the year 1800 copyhold tenure could, as now, be extinguished by merger, viz. (1) by the lord acquiring the tenant's interest, or (2) by the tenant acquiring the lord's. The latter is called "enfranchisement." A tenant could only obtain enfranchisement by the voluntary act of the lord, and where the lord was himself (as was most frequent) a tenant for life of the lordship, he was incapable of enfranchising, except under some express power.

At the commencement of the late Queen's reign an agitation had sprung up for the compulsory enfranchisement of copyholds, on the ground that the tenure had long since lost its *raison d'être*; and, by a series of Acts known as the Copyhold Acts (beginning in 1841 and now consolidated in the Copyhold Act, 1894),[1] either lord or tenant can, at the present day, insist on the enfranchisement of copyhold lands, the lord's compensation in case of dispute being settled by the Board of Agriculture. The lord's right of escheat, and his right to minerals and sporting rights, and the tenant's right of common, are, however, preserved.

And this brings me to the consideration of the changes in the law relating to Commons.

[1] 57 and 58 Vict. c. 46.

Whatever the real origin of common lands may have been, it has been settled for centuries that they are the freehold waste lands of the lord of a manor, over which, by ancient custom, prescription, or grant, certain persons called Commoners, have a right in common with the lord himself and others, to a *profit à prendre*. This profit is of divers kind. Sometimes it is a right to depasture cattle, sometimes to fish, sometimes to cut turf, and so on. At the beginning of the past century the law recognised no one as having any rights in common lands except the lord and the commoners. If they were all of one mind they could enclose the common and divide it among themselves. Moreover, by the Statute of Merton,[1] passed in 1265, the lord alone could, without anyone's consent, enclose part of a common, so long as he left sufficient to satisfy the rights of the commoners. Toward the end of the 18th century an idea sprung up that the total enclosure of commons was desirable in the public interest, on the ground that, thereby, additional land would be brought under cultivation; but, as the unanimous agreement of lord and commoners was not often obtainable, owing to some of the latter being under disability, private Acts of Parliament were usually necessary, and these of course were costly. For this reason Parliament passed a general Enclosure Act in 1845[2] to "facilitate the enclosure and improvement of commons and lands held in common," and for other purposes. But this Act and its nine amending Acts only cheapened and facilitated the total enclosure of a common, by providing a cheaper procedure.

By the year 1866 a reaction had set in. The

[1] 20 Hen. III. c. 4. [2] 8 and 9 Vict. c. 118.

growth of cities and the increase of population had rendered the commons valuable as recreation grounds, while Free Trade had reduced their importance for agricultural purposes. Accordingly in 1866 and 1869, the Metropolitan Commons Acts[1] were passed to prevent the enclosure of commons in the neighbourhood of London, and to provide for their management and regulation. In 1876 another Commons Act was passed,[2] which, among other things, authorised the Enclosure Commissioners (now merged in the Board of Agriculture) to entertain proposals for the regulation of commons. By Section 8 no enclosure of suburban commons was to be sanctioned, unless the sanitary authorities of towns within six miles were represented before the Commissioners, and special provision was made for the benefit of the inhabitants of such towns. All these Acts related exclusively to *complete* enclosure, and left untouched the lord's right under the Statute of Merton to enclose so much of a common as was not required for the exercise by the commoners of their rights. In the year 1888 however that doctrine received a rude blow in the case of *Robertson* v. *Hartopp*.[3] In that case the Court of Appeal held that the question whether there was a sufficiency of common left, must be determined, not according to the average number of animals which the commoners had for a long period been in the habit of turning out, but according to the aggregate number which they were theoretically entitled to turn out. Moreover the Court queried whether the modern system of sheep farming, according

[1] 29 and 30 Vict. c. 122, and 32 and 33 Vict. c. 107.
[2] 39 and 40 Vict. c. 56.
[3] 43 Ch. D. 484.

to which sheep do not, while turned out, get all their sustenance from the common, ought to be taken into consideration. As one of the Counsel engaged, wittily observed, the question of sufficiency of common now depends on the problematical hunger of a hypothetical sheep. This case has since been followed by the Commons Act, 1893,[1] by which the lord's right to make a partial enclosure under the Statute of Merton is no longer to be exercised without the consent of the Board of Agriculture, which is to have regard to the same considerations, and if necessary to make the same enquiries as are by the Commons Act, 1876, to be made on an application for the total enclosure of a common. Since this Act has been passed, having regard to the trend of public opinion, it is safe to say that very few enclosures either total or partial have been or will be lawfully made.

### (6) *Changes in the Law relating to Tithes.*

Let us now turn to changes in the law relating to tithes. Tithes consisted of the right to a tenth part of the profits of land. At the beginning of the 19th century they were payable in kind, a most inconvenient practice. By the Tithe Commutation Act, 1836,[2] however, a rent charge was substituted, varying with the price of corn.

Between 1880 and 1891 an agitation against payment of this rent charge sprung up among Nonconformist farmers, especially in Wales, and reached such serious proportions (tenants refusing to pay, and submitting rather to have their goods distrained), that

[1] 56 and 57 Vict. c. 57.
[2] 6 and 7 Will. IV. c. 71, amended by a long series of Acts.

Parliament passed the Tithe Act, 1891.[1] By this Act tithe rent charge was in future made payable by the owner of land, and any contract between him and his tenant, under which the latter is to pay it, is made void. By this ingenious method the grievance of Nonconformist tenants was "scotched," without the parsons being deprived of the fund originally provided for their maintenance.

### (7) *Landlord and Tenant.*

The past century witnessed numerous changes in the law relating to landlord and tenant—so many that it is quite impossible to touch upon all of them. The most important relate to distress for nonpayment of rent, relief against eviction or forfeiture for breach of covenants or conditions, and compensation for improvements made by the tenant of agricultural land.

The chief change that has taken place in the law of distress is with reference to lodgers' goods. Before the year 1871 the landlord of a person who let lodgings could enforce his rent, not merely by distraining the goods of his own tenant (the lodging-house keeper), but also the goods of that tenant's lodgers. This was, with reason, considered to be very unfair to lodgers; and, consequently, it was enacted by the Lodgers' Goods Protection Act, 1871,[2] that in the event of a lodger's goods being distrained by his landlord's landlord, the lodger might, under certain conditions and with certain formalities, require the superior landlord to give them up, under penalty of being adjudged guilty of an illegal distress.

With regard to relief against forfeiture (or eviction

[1] 54 Vict. c. 8. [2] 34 and 35 Vict. c. 79.

as it is more popularly called), the right to evict for nonpayment of rent or breach of covenant is not given to landlords by law. It depends entirely upon contract. For centuries, Courts of Equity have relieved against a condition for eviction on nonpayment of rent, on the terms of the tenant paying the rent in arrear, with interest; and statutory force was given to this doctrine so long ago as the 18th century. But the jurisdiction of Courts of Equity to relieve against forfeiture for breach of covenant was much more restricted, and was practically confined to cases where the breach had occurred through fraud, accident, or mistake. The consequence was, that a man who had let property on a long building lease at a ground rent, could annex the whole of the lessee's expenditure on the buildings, if the latter happened to commit some comparatively small breach of covenant—for instance, a covenant to keep the buildings in repair or insured. In such cases the penalty was out of all proportion to the fault.

In the year 1859, Courts of Equity were empowered by Lord St. Leonard's Act,[1] to grant relief against forfeiture for breach of a covenant *to insure*, and that provision was subsequently extended to Courts of Common Law.[2]

In 1876, and again in 1877 and 1880, Sir Alfred Marten (the chairman of our Board of Studies) carried Bills through the House of Commons for extending equitable relief to lessees who might incur forfeiture for breach of covenant, but for one reason or another these Bills did not become law.

The entire subject is, however, now governed by

[1] 22 and 23 Vict. c. 35, secs. 4-9.
[2] 23 and 24 Vict. c. 126, sec. 2.

section 14 of the Conveyancing and Law of Property Act, 1881,[1] which provides, that a right of forfeiture for breach of covenant or condition in a lease with certain specific exceptions,[2] shall not be enforceable by action, or otherwise, unless, the lessor serves on the lessee a notice, specifying the breach, and requiring the lessee to remedy it, and the lessee makes default in doing so for a reasonable time.

The Court is given power to relieve, on equitable terms as to damages, the granting of an injunction to restrain further breaches, and so on.

Agricultural tenancies have received the particular attention of Parliament during the last quarter of the century—first by the Agricultural Holdings Act, 1875, and subsequently by the similar Act of 1883, which repealed the former. The provisions of this Act (since amended by the Agricultural Holding Act, 1900) are too complicated for me to give them in detail. All I can do is to state shortly the general scheme of the Act with regard to improvements. The general scheme is to make landlords liable to pay to their outgoing tenants compensation for unexhausted improvements. The Act goes into great detail as to the nature of these improvements, as to the mode in which the compensation is to be assessed, and the mode in which its payment is to be enforced. But the persons who framed the Act had to deal with the fact that landlords in England are nearly always only limited owners, that is to say, that the greater part of farm land is in settlement,

[1] 44 and 45 Vict. c. 41.

[2] Covenants against assigning or underletting, and covenants in mining leases and conditions for forfeiture on bankruptcy of the tenant. But as to the last see Conveyancing Act, 1892, sec. 3.

and the landlord is generally only a tenant for life. It would, therefore, be unjust to make a landlord pay for improvements out of his own pocket without giving him any right to recover the amount paid from the settled estate in the event of his immediate death. The plan adopted in the Act is to make a tenant for life pay the compensation to the outgoing tenant, but to give him a right to obtain a charge upon the settled estate for the amount of the payments so made by him.

The Act of 1883 differs from the previous Act of 1875 in the important particular that the Act of 1883 cannot be negatived by contract, whereas the Act of 1875 might be, and in practice always was.

The law with regard to agricultural fixtures has, also, been modified by statute. The first Act is 14 and 15 Vic. c. 25, sec. 3; but the subject is now governed by section 34 of the Agricultural Holdings Act, 1883, which provides that all agricultural fixtures put up by a tenant after the commencement of the Act may be removed at, or within, a reasonable time after the expiration of the tenancy; but one month's notice must be given to the landlord of the intention to remove, and the landlord has a right of pre-emption. Honour to whom honour is due. This reform of the law is again due to Sir Alfred Marten, who drafted and piloted through the Commons the clauses to the same effect in the Agricultural Holdings Act, 1875.

### (8) *Fusion of Law and Equity.*

I now come to what at one time seemed to be the most important change of the 19th century in

the realm of law, viz., the Judicature Act, 1873. At first it was thought by many that this Act would so completely fuse law and equity as to abolish the protective efficacy of the legal estate, and thereby do away with the necessity of legal conveyances.

It soon, however, became obvious that all the Act did was to fuse the Courts, and not the principles administered by them; that the old distinctions between the legal and equitable estate were still preserved; and that, in fact, persons who acquired the legal estate in property with all the formalities required by common law or statute, were still to be regarded as *primâ facie* the true owners, unless and until someone else could show that he had a better claim in equity. The purchaser who has been careful to embark in a legal estate, may still regard with a complacent mind a sea of contending equities which might otherwise engulf him. In fact, the main effect of the Judicature Act, so far as the fusion of law and equity is concerned, may be expressed in three lines from King Lear:

> "Thou robed man of justice, take thy place,
> And thou, his yoke fellow of Equity,
> Bench by his side."

And perhaps it is as well that this was so. In 1875 Parliament purported to take away partially the protective efficacy of the legal estate in the case of mortgages, leaving rival innocent incumbrancers to rank according to the respective dates of their securities. The result was, however, so disastrous to the credit of persons wishing to borrow on mortgage, and particularly to builders and others accustomed to borrow by instalments, that a precipitate retreat had

to be made, and the old rule was restored in the next session. [1]

### (9) *The Practice of Conveyancing.*

So far I have been dealing with the changes in the general law of real estate. I now propose to draw your attention to changes relating to instruments by which the ownership of real estate is transferred from one person to another. Such transfers occur either *mortis causa*—in plain English, by wills—or *inter vivos*—*i.e.* by transfers made by living persons.

In the early part of the 19th century, a will of real estate had, under the provisions of the Statute of Frauds,[2] to be witnessed by three credible witnesses. If one of them was considered to be "incredible" (for instance if he were a convict, or even if he took beneficially under the will,) the entire will was void. Moreover, every general devise of land spoke from the date of the will, and not from the death of the testator; so that no freehold land acquired after the date of the will passed by it, unless the will was confirmed by a subsequent codicil. A devise of real estate without words of limitation, only *prima facie* passed a life estate to the devisee—a shocking injustice in the frequent case of an unlearned testator making his own will.

Copyholds, too, could not be devised at all, except by special custom, unless they were surrendered to the lord to uses to be declared by the will, or unless they were vested in trustees; so that, unless the formality of a surrender, or the creation of a previous trust had been effected, the will was useless so far

[1] See 37 and 38 Vict. c. 78, sec. 7, and 38 and 39 Vict. c. 87.
[2] 29 Car. II. c. 3.

as Copyholds were concerned. This absurdity was removed in 1815, by the Act 55 Geo. III. c. 192, which rendered devises of copyholds, though not surrendered to the use of the testator's will, as valid as if they had been so surrendered. It conferred no new testamentary power, but merely supplied a simpler form of procedure.

However, the great reform of the century in relation to the law of wills, was made in 1837 by the Wills Act.[1] By this Act a will is to be signed in the presence of two witnesses, instead of three, and the credibility of the witnesses is not to affect the validity of the will; but where a witness, or his or her husband or wife, is beneficially interested under the will, the will is good, but the gift to the witness is void. Wills are to speak, with regard to the real and personal estate comprised in them, from the death of the testator, and not, as formerly, from the date of the will. A gift to a child or other issue of the testator, who dies before him, leaving issue, no longer lapses as formerly, but takes effect as if the donee had died immediately after the testator.

The Wills Act also put the subject of revocation of wills on a better footing, providing that, among other acts, marriage should be an effectual (although perhaps an expensive) revocation. The act also made a general devise of lands, to include not only lands belonging to the testator, but also lands over which he has a general power of appointment.

But perhaps the most important change introduced by the Wills Act was the provision that, where real estate is devised to a person without words of limitation, it is to be construed as passing the fee

[1] 1 Vict. c. 26.

simple, or other the whole estate of the testator, unless a contrary intention shall appear, thereby completely reversing the former rule.

There were other changes introduced by the Wills Act, too numerous or too technical to mention here, but those which I have specified were the most important.

Let us now turn to transfers of real estate by act *inter vivos*. At the commencement of the 19th century, conveyances of land on sale were usually carried out by the method known as a lease and release. In some cases, however, the time-honoured feofment with livery of seisin continued to be used. As I said in the last lecture, married women could only convey by means of the costly process called a fine, and tenants in tail by the still more costly process of a Common Recovery, for both of which simple deeds were substituted in 1833.

You will remember that the lease and release was an ingenious method of making conveyances without livery of seisin, depending for its efficacy on the Statute of Uses. A vendor first made a bargain and sale of the property to the purchaser for a year in consideration of 5s. Under the Statute of Uses this immediately vested the legal possession in the purchaser. Being thus in legal possession, the reversion which still remained in the vendor, was capable of being released by another deed, in which the true consideration for the transaction appeared. This method required two instruments, and was cumbersome and expensive; and it is astonishing that it took several centuries before its absurdity struck Parliament. It was not until 1841 that any attempt was made to put the matter on a more rational footing. In that year

an Act was passed, by which it was provided, that a release, if expressed to be made in pursuance of that Act, should be as effectual as a lease and release. This was absurdly illogical, as a release was essentially an instrument releasing an outstanding right, in favour of one who already had a possessory interest. In 1845 the matter was put on a more satisfactory basis by the Real Property Act[1] of that year, by which it was enacted that all corporeal hereditaments should thenceforth "be deemed to lie in grant, as well as in livery." In other words, the old Common Law theory that actual delivery of possession, or the newer theory that a notional delivery by the aid of the Statute of Uses was necessary to a transfer of freehold land, was swept into the limbo of pedantic rubbish, and a simple deed of grant was made sufficient. This deed of grant is still the common form of conveyance.

Nevertheless, a deed of grant in 1901 is a very differently worded instrument to what it was in 1845. True, the framework is the same. The parties, recitals, and operative part still survive ; but they are shorn of that extraordinary splendour of verbiage which distinguished documents, the draftsmen of which were paid at the rate of so much per 72 words.

This latter-day brevity is owing to the Conveyancing and Law of Property Act, 1881,[2] not unassisted perhaps by the Solicitors' Remuneration Act of the same year,[3] by which the remuneration of solicitors takes the form of a commission on the purchase money instead of fees varying with the length of the documents. By the first of these Acts all the

[1] 8 and 9 Vict. c. 106. [2] 44 and 45 Vict. c. 41.
[3] 44 and 45 Vict. c. 44.

old and lengthy covenants for title entered into by a vendor were swept away, and implied statutory covenants were substituted. Such covenants now depend upon the capacity in which the vendor is expressed to convey the property. If he purports to convey as beneficial owner, one set of covenants are implied; if as trustee or mortgagee or personal representative, another set.

Moreover, instead of the lengthy covenant to produce deeds and keep them safe, a simple acknowledgment of the right to production, and an undertaking for safe custody, implies elaborate statutory duties in that behalf. In fact, to paraphrase the advertisement of a modern camera, if the practitioner has sufficient intelligence to put in the right catch-words the Act of Parliament does the rest.

I now approach the last branch of the subject, viz., the new system of land transfer, which was practically initiated in 1897. I say practically, because, theoretically it was first started in 1862. But it only became practical in 1897, because it was for the first time made compulsory in certain districts by the Land Transfer Act of that year.[1]

At present it is in an experimental stage, but although highly unpopular with the profession, I confess that it seems to me to be likely in course of time to supplant the present system. Its object is to cheapen and shorten the investigation which a purchaser or mortgagee of land has now to make by destroying the necessity for a continual repetition of investigations of title on sales or mortgages however closely they may follow each other.

Under the present system a purchaser under an

[1] 60 and 61 Vict. c. 65.

open contract is entitled to have handed to him an abstract of every document affecting the title executed within the past 40 years. This abstract has to be compared with the original documents, the effect of each instrument has or ought to be considered by a lawyer, and deaths, pedigrees, and intestacies proved.

Now if this were done once for all, the expense on each subsequent sale or mortgage would be a trifle; but under the existing system, this expensive investigation has to be repeated *ab initio* every time that a sale or a mortgage is made.

It is this *repeated* investigation that registration of title is intended to avoid. The registrar keeps the histories of all titles on his books up to date, so that an intending purchaser or mortgagee has only to ask what the state of the title is, and the registrar is able to tell him at once who is the owner and what incumbrances or restrictions, if any, affect the property.

I am informed that in the U.S. (at all events in New York) the same thing has been effected in a different way by means of insurance companies. There, by payment of a small premium, a landowner can get his title investigated and guaranteed by an assignable policy, and this policy is accepted by purchasers and mortgagees in lieu of any investigation of his title. Some of us may think that this simple expedient might have been tried here; but whether owing to want of enterprise on the part of insurance companies, or what, I know not, I believe it has never been publicly suggested.

The first attempt at registration of title in England was made in 1862 when the late Lord Westbury succeeded in passing an Act to facilitate the proof of title and conveyance of real estate.

This Act was not compulsory. Its fatal defect was that it only provided for the registration of indefeasible titles after strict examination. The result was that Lord Westbury's Act was practically a dead letter.

The next attempt was made by the late Lord Cairns in the Land Transfer Act, 1875, the broad principle of which was (1) that landowners could register with a mere possessory title, *i.e.* should not be bound to have their title investigated at all, and (2) that some person (not necessarily the fee simple owner) should be registered as proprietor, trusting to cautions and inhibitions lodged with the registrar, to prevent such registered proprietor (who is in reality a trustee for all persons interested) making away with, or incumbering the property, where he could not legitimately do so. This Act was not compulsory, and, mainly for that reason, was as complete a failure as Lord Westbury's Act of 1862, and remained practically a dead letter until the present Chancellor promoted and safely piloted through Parliament the Land Transfer Act of 1897. This Act is in form merely supplemental to the Act of 1875, but it is in substance far more important, because, by containing provisions for gradually making the registration of titles compulsory throughout England[1] on the occasion of sale, it has supplied the spark of life to the inert mass of the 1875 Act. Very wisely its author did not attempt to frame elaborate details, but reserved powers to refer such details to a Committee of experts who have issued an elaborate code of rules.

Let us examine the details of the new scheme so far as time will permit.

[1] At present it is confined to the County of London.

Freehold land (for the Acts do not relate to copyholds, and there are separate provisions as to leaseholds) may be registered with either

(*a*) An absolute title,
(*b*) A qualified title, or
(*c*) A possessory title.

But it may be safely predicted that although section 17 of the Act of 1875 permits and encourages the registrar to give a certificate of absolute title to one who has merely a good holding title, and expressly reserves all questions of boundaries, but few proprietors will elect to register with anything but a possessory title. They did not do so before 1897, and there seems to be no new reason why they should go to the expense and risk under the Act of that year.

What, then, is the effect of registering land with a possessory title? The immediate effect is microscopic. In such cases, all that the registrar can say is—"On such and such a date, A registered this title as a possessory title. Whatever estate, if any, A then had, is now vested in B as his registered successor. But whether A was fee simple owner when he placed the title on the register, I cannot say, nor can I guarantee that the title is free from flaws before that date. You must therefore investigate the title of A up to the date when he first registered it, or else take the risk." In other words, registration with a possessory title, does not in any way affect or prejudice the enforcement of any estate, right, or interest adverse to the estate of the *first* registered proprietor. The registrar, on the other hand, will be able to give a guarantee that whatever estate, if any, the first

registered proprietor was entitled to, is now vested in the vendor as his successor. And of course, when property has been on the register for 40 or 50 years, so that all probabilities of the first registered proprietor having been a mere life tenant may be disregarded, then, practically, such a registered title will have become as good as an absolute one, and certainly as good as an ordinary marketable one.

The net result is, that until a possessory title has been registered for 40 years at least, it will not be safe to assume that it is a good one, or that a purchaser or mortgagee who fails to investigate the title prior to the first registration will get any relief or compensation if he should be turned out. And this danger is accentuated by the fact (regrettable, I think) that, by rule 18, a person who registers with a possessory title, is not bound to state whether the property is encumbered.

There are three registers to be kept, viz.:

(1) A Property Register,
(2) A Proprietorship Register, and
(3) A Charges Register.

The property register contains a description of the property and refers to a plan, the filing of which is compulsory. The property register also describes all easements and restrictive covenants existing for the benefit of the registered property.

The proprietorship register states whether the title is absolute, qualified, or possessory, specifies the registered proprietor, and contains a note of any cautions, inhibitions, and restrictions affecting his right of disposition.

The charges register shows not only mortgages

and other incumbrances, if any, but also servitudes and restrictive covenants, with which the registered land is burdened. (Rules 3, 6, and 7.)

There is no investigation whatever of title on an application to register with a possessory title. Indeed it would swamp the scheme if there were. It has been estimated (and Lord Cairns satisfied himself in 1875, that the estimate was not far wide of the mark) that upwards of 1000 conveyances or mortgages are executed on every working day of the year. If on the registration of these transactions an official investigation had to be made, it is obvious that some thousands of skilled registrars would be needed.

Having regard to the custom of strictly settling estates in this country, and also to the frequency of mortgages, it is clear that in any system of registration of title, these facts must be taken into consideration. Consequently we find that the Act provides not merely that a fee simple owner may be registered as "proprietor," but also:

(1) Trustees for sale,

(2) Mortgagees whose power of sale has arisen, and

(3) Tenants for life.

But in whichever of these capacities a man is registered he becomes (*qua* the outside public) capable of selling and conveying or charging the fee simple. He is not registered as Trustee Proprietor, as Mortgagee Proprietor, or as tenant for life Proprietor, but simply and solely as proprietor.

You may ask, in that case, what safeguard is there for the beneficiaries, the mortgagor, or the remainderman, as the case may be. What is to prevent this

fictitious statutory proprietor from selling the land, and pocketing the proceeds? The answer is, that where these limited owners are the first registered proprietors, then (as I have already mentioned), their proprietorship is by the Acts, made expressly subject to all estates rights and incumbrances existing at the date of that registration. Their position, *qua* purchasers, is no better and no worse than if he had never registered.

Where, however, a trustee, tenant for life, or mortgagee, is not the first registered proprietor, and the settlement or mortgage was not in existence at the date of the first registration, then, *prima facie*, the registered proprietor (although only in fact a limited owner) can sell, or convey, or charge the property, and confer a good title on his purchaser or mortgagee. I say *prima facie*, because the Acts and rules provide means by which the remainder-man (in the case of registered tenant for life proprietors), the beneficiaries (in the case of trustees) and the mortgagor (in the case of mortgagees) may protect themselves against the abuse by a registered proprietor of his statutory powers, viz.: by the registration of cautions, inhibitions, or restrictions.

A caution merely entitles the person giving it to notice of any intended transfer or charge. It is the equivalent of a stop order on a fund in Court. It would appear to be the appropriate safeguard of *cestuis que trusts* and equitable mortgagees.

An inhibition, while it remains in force, is a complete bar to any registered transfer or charge. It can only be placed on the register with the consent of the registered proprietor or the order of the registrar or the Court.

A restriction, is a notification placed on the register with the assent of the registered proprietor, restraining registered transfers or charges without certain consents, or unless purchase money is paid to certain persons. It is apprehended that restrictions and inhibitions will be the appropriate safeguard where trustees for sale, or tenants for life, are the registered proprietors. Take for example the case of a tenant for life; form 6 appended to the rules gives the formal restriction and inhibition in the following words:

"Restriction.—Until further order, no transfer of the land is to be made except on sale or exchange, and the purchase moneys on sale are to be paid to A. B. and C. D., or into Court. No sale of the mansion house and land shown and edged red on the plan attached hereto is to be made without the consent of the said A. B. and C. D., or of the Court, and no charge is to be created without the consent of A. B. and C. D.

Inhibition.—On the death of E. F. (the reg. pro.) no entry is to be made until further order."

In this form you see that the power of sale and exchange given to tenants for life by the Settled Land Acts is preserved, subject to the conditions annexed by these Acts to the exercise of the power, viz., that the purchase money is to be paid into Court or to two trustees. But, as these Acts give no powers to mortgage except for very restricted purposes, the restriction prevents the tenant for life charging the property, as he would (as registered proprietor) be otherwise capable of doing. Then, again, as the Settled Land Acts prohibit the sale of the principal mansion house without the consent of trustees or Court, the registered restriction provides for that.

And, lastly, the inhibition prevents any attempt by the personal representatives of the tenant for life getting themselves placed on the register.

Subject to the safeguards afforded by cautions, inhibitions, and restrictions, however, and to estates, incumbrances, and interests, existing at the date of the first registration of a possessory title, a registered proprietor has full power to confer on a purchaser or chargee, a good title free from the claims of persons whose interests have arisen since the date of the first registration; even (according to section 83 of the 1875 Act as amended by the Act of 1897), although such purchaser or mortgagee has notice of such interests. That provision at first sight seems monstrous, but its bark is worse than its bite, because, as I shall presently show you, any person who is injured, and who has not by carelessness contributed to his injury, will get compensation from the State.

Curiously enough, although a registered proprietor can thus deal with the land itself, so as to defeat the rights of persons who have not entered cautions or restrictions or obtained inhibitions, the Acts do not enable him to create easements or profits with a similarly clear title; so that he who purchases a right of way over land, would, it would seem, have to investigate the title of his vendor to create the right —surely a strange anomaly. Still stranger is the fact (at least it seems to me to be the fact) that although the Acts give a registered proprietor (against whom there are no cautions, inhibitions, or restrictions) full power to alienate the fee simple, they give him (at all events not in express terms) no corresponding power to create unimpeachable leases. A lessee, therefore, who is taking a long term with the

view of spending money on property (*e.g.* under a building or mining lease) will apparently still have to investigate the title of the registered proprietor to grant the lease.

A similar remark applies to all persons whose rights are not in possession. The registered proprietor must always be the man entitled to possession. The Act makes no provision for registering titles in reversion or remainder, or the equitable rights of beneficiaries. If, therefore, a reversioner, or remainder-man, or beneficiary, wishes to sell or mortgage his interest in registered land, the register will be useless to him, and his title will still have to be investigated in the old way.

I now turn to a different branch of the subject. What is to happen where, owing to fraud or mistake, the register does not represent the true state of the title, so that someone has blundered and someone is injured? The answer is, that the injured party will receive compensation from the State. It was one of the many weaknesses of the Act of 1875 that by making the register infallible in favour of purchasers or mortgagees who acted on the faith of it, it threatened the security of landowners whose estates were acquired after the first registration (even of those in possession) without giving them any compensation. A *bona fide* purchaser for value who got on the register, was apparently secure, even although he claimed under a forged transfer; and the unfortunate true owner, even when in possession, was liable to be ousted without a penny of compensation. This was one of the many reasons why lawyers dissuaded clients from registering their titles under the Act of 1875. The Act of 1897 has recognised

the injustice of this, and absolutely safeguards the true owner *who is in possession.* Any fraudulent or erroneous entry in the register to which he is no party is not to affect *him.* On the other hand, any other person who is injured by it, will be compensated in money by the State, and the register will be rectified.

Possession is still therefore a strong fortress of the law, but it is not so strong as it has heretofore been; because the register, and not possession, is *prima facie* evidence of title. So that where the register has been fraudulently or erroneously tampered with, the onus of proof will be shifted to the man in possession.

However, even a true owner who is ousted, will not get compensation where "he has caused or substantially contributed to the loss by his act, neglect, or default"; and the omission to register a sufficient caution or inhibition or other restriction, to protect a mortgage by deposit or other equitable interest, is to be "deemed to be a neglect"[1]—a plain hint to beneficiaries to look sharply after their trustees.

In order to make the register, and the register only, the true test of title, sec. 12 of the Act of 1897 contains a very strong and debatable enactment in these words:

"A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly." In other words, the Statutes of Limitation are not to apply to registered land. It is true that the section goes on to provide that where a person not on the register, has been in possession for

[1] Act of 1897, sec. 7 sub-sec. 3.

a period sufficient to give him a title under the Statute of Limitations, he may apply to the Court to rectify the register in his favour. But the necessity of commencing active litigation is very different to the acquisition of a title by passive possession; and moreover, the Court is only to rectify the register subject to any rights acquired for valuable consideration on the faith of the register. Here, then, is another assault on the fortress of possession. Registration and not possession will be the nine points of the law in future. Mr. Cherry, in his excellent book on the Acts, points out that the draftsman seems to have confused registration of title and possession. "All that a register can properly do is to show the state of the paper title, and a purchaser or a mortgagee ought to satisfy himself by enquiries on the spot as to whether he will get possession under that paper title. The point is not merely academic. Take the case where A purchases land from B, but owing to some mistake or carelessness of his solicitor plot X is not described in the registered map. A goes into possession, and retains possession of plot X, say, for twenty years, and perhaps builds on it. Plot X all this time remains on the register in B's name, and on his (B's) death his executors sell and convey to C, who gets himself registered. Here it seems plain that A, the real owner, will lose plot X, and get no compensation, although if C had taken the simple precaution of asking on the premises, he would have learnt of the mistake."

So far as to registration. Now a few words as to transfer of registered land. A transfer, then, is to be made under rule 77 by an instrument in a prescribed form.

Here is the form:

Land Transfer Acts, 1875 and 1897.
District . . . .
Parish . . . . .
No. of title. . . . . .

25th March, 1900. In consideration of £ , I, A B, of, etc., hereby transfer to C D, of, etc., the land comprised in the title above referred to.

Signed, sealed, and delivered, etc.

The transfer being made, the registrar keeps it, and hands to the transferee a scrap of paper called a "land certificate," which henceforth is his sole evidence of title. The bulky and imposing sheepskin so familiar to us all, on which, in the pompous metaphor of legal writers, a landowner is entitled to sit, will gradually give place to this single attenuated document; so that, apparently, in the fulness of time, the English landowner will become a kind of territorial cherub.

With regard to transmission of registered land on the death of a registered proprietor, the appointment of a real representative by the Act of 1897 has greatly facilitated matters, because it has created a person with whom the registrar can deal.

Where, however, the land is settled, the question is not so simple, and this, I fancy, is where the officials will find the shoe pinches. For instance, where the deceased is only tenant for life, the property does not vest on his death on his real representative, and the registrar has to look to someone else to deal with. Where possible, the trustees of the settlement (if any) are to undertake this duty.

There are, however, many cases where either there are no trustees of a settlement or they are supine.

In such cases any person interested may apply for the registration of a new proprietor. In that case (and here the difficulty arises) the registrar must enquire into the terms of the settlement, settle draft restrictions and inhibitions, give notice to the trustees (if any), to the succeeding tenant for life, and such other persons as he may think fit, and, if no valid objection is made, enter the successor as proprietor.

So much for the registration of freehold titles.

The Acts and rules also make provision for the registration of leasehold titles much on the same lines. All I need say on this subject is, that in areas where registration is compulsory all new leases, (and also transfers on sale of all existing leases) having at least 40 years to run, must be registered.

We now come to the very important subject of mortgages of registered land, and, curiously enough, the Acts and rules make no provisions whatever for legal mortgages in the ordinary sense. If a regular legal mortgage is required the only way of creating it is to imitate the present mode of making a mortgage of stocks or shares, viz., to substitute the mortgagee as the registered proprietor, and then to regulate the equitable rights of the parties by a collateral deed, which is not entered or noticed on the register at all.

What the Act of 1875 does do, however, is to create a new kind of statutory mortgage, called a registered charge. This charge is really an equitable charge. It does not pass the legal estate to the chargee, but merely gives him a lien with certain implied covenants for payment of principal and interest, and statutory powers of sale, foreclosure, etc. (Secs. 22-28).

Now, if the land be registered with an absolute or qualified title, these registered charges may be well enough, because they are to rank *inter se* in order of registration. But where land is registered (as most land will be) with a possessory title, then, as all registered dealings are to be subject to unregistered dealings entered into prior to the date of the first registration, a registered charge will be nothing more or less than an equitable mortgage, which, as we all know, is subject to all prior equitable mortgages and claims, whether known or unknown. That is not a very enticing prospect, and, therefore, I imagine that for many years to come registered charges will be neglected in favour of true legal mortgages, in which the mortgagee will insist upon being placed on the register as proprietor of the land, so as to get the protection of the legal estate, the mortgage itself being regulated by a collateral deed. But in addition to regular mortgages, we all know that there is, under the present system, an important class of equitable mortgages, known as mortgages by deposit of deeds. To the commercial community this is, perhaps, the most important, because it is the way in which a commercial man can instantly, without any delay whatever, raise money from his bankers. He deposits his pile of sheepskins, and the money is at once carried to his credit. How is this to be effected under the new system? The answer is, by deposit of his land certificate (sec. 8 sub-sec. 4 Act of 1897). In one way this new form of mortgage will be a better security than the old one. Under the present system a mortgagee under a deposit of deeds takes subject to all prior equities, whether he has notice of them or not.

Under sec. 8 sub-sec. 4 of the Act of 1897 a mortgagee, by deposit of a land certificate, would seem to oust all equities prior to the date of the certificate which are not entered on it, and this would seem to enable a fraudulent trustee whose *cestuis que trusts* have not entered cautions, to give a valid charge on the trust estate. On the other hand, a mortgagee by deposit of the land certificate, does not gain priority over charges entered since the date of the certificate, and is bound to make enquiries as to subsequent charges, from the registrar, which he can do, however, by telegram. He must also—and this is of the utmost importance—give a notice to the registrar by registered letter or otherwise of his mortgage. Curiously enough, the common case of a mortgage by deposit with a bank, to secure an overdraft, is not specifically dealt with; and it may be plausibly argued that in such cases the banker would have on each occasion of cashing a cheque, to search the register for subsequent incumbrances. I think, however, that this cannot be so, as the effect would be to make such charges absolutely useless, and to dislocate commerce in the most disastrous manner. The true view seems to me to be, that a mortgagee by deposit to secure a current account, having notified his charge to the registrar, may safely continue to make advances until he receives actual notice to stop from a subsequent incumbrancer.

Such is a brief review of the new conveyancing, which, like the new woman, is still somewhat of an experiment. Some nervous practitioners fancy that it is the Banshee whose appearance portends the death of that quiet and respectable figure, the conveyancing counsel. I myself have no such

fears. So long as the English land laws retain their present complexity experts will be required to advise upon them; and so long as wills, settlements, and leases, not to mention partnership deeds and contracts, have to be drawn, the wise saying of King Solomon will hold good that "without counsel purposes are disappointed."

ARTHUR UNDERHILL.

A lady who read the proof sheets of the two preceding lectures on "Changes in the Law of Real Property" presented the Lecturer with the following amusing summary, which was read to the audience at the conclusion of the second Lecture, and received with much favour as a kind of piquant liqueur after the somewhat heavy pabulum provided in the Lecture itself—

It is, good Sirs, our duty and delight
A Century of Law to view to-night;
To mark advance of Justice far and wide,
See ancient legal Cobwebs brushed aside,
Watch Land enfranchised, and the Wife of Means
Become the Owner of her Own demesnes.
First, shade of Darwin! see the traces die
That link with Law Man's Simian ancestry:
Life-tenants now no more their lot bewail
But, like the Missing Link, cut off the Tail
And 'neath the Settled Land Act's fostering care
Their acres sell to Jew and Millionaire.
How blest their state! but better still, by far,
Those Ladies thrive, whom kindly Settlors bar
From alienation of their treasured hoard
For debts on Lodging, Trinkets, Dress, or Board.
No more enslaved, the Wife can proudly say
"'Tis mine to Spend, my husband's part to Pay."
The legal mistress of her Real Estate,
She leaves her wretched creditors to fate;
For if she's *too* expensive—naughty pet!—
Her husband *may* repudiate the debt.
Next, note of ancient Easements the Grantee;
In olden days, what would his feelings be

When called by grudging Owners to explain
In what his right to Privilege had lain ?
He needs must mumble of a Grant mislaid,
Which, Non-existent, still must be Obeyed.
Now, need he fear ? If twenty years have flown,
Since first Enjoyment of this Use he's known,
He knows Possession will defend him best
And calmly says, "My Lord, *j'y suis, j'y reste.*"
Last great Reform, Land Transfers let us view ;
A Century ago, this process too
With Lease and Release so was cumbered o'er,
To buy—or sell—a pigsty was a bore.
'Twas said, the Owner then might proudly sit
On mighty Sheep-skins with his Title writ.
The Landlord of To-day no longer needs
This ponderous Sofa built of Flawless Deeds,
A daintier Camp-stool will his Weight withstand
Yclept in law, Certificate of Land.

E. M. B. U.

## XI.

# CHANGES IN THE LAW AFFECTING THE RIGHTS, STATUS, AND LIABILITIES OF MARRIED WOMEN.

(Thursday, February 14th, 1901.)

THE subject on which I have to lecture is the change during the last century in the law affecting the rights, status, and liabilities of married women. I do not suppose that there is any branch or department of the law in which the change has been greater or the contrast more violent. It is not that there has been an alteration, but a revolution in the law. If one may imagine a great lawyer of a century ago presenting himself for examination to-day before the Board of Examiners, and being put through an elementary examination on the law of husband and wife, there is scarcely a question which he could answer correctly.

Let me summarise what the change is.

A century ago a married woman was, in legal text-books, the associate of idiots and lunatics; she was, generally speaking, as incapable of enjoying rights over property, or creating rights by contract, as her own infant children. Upon the marriage the husband and wife became one person in law; that one person

was the husband ; the wife, for nearly all legal purposes, became on her marriage a nonentity. She was the shadow, and her husband the substance ; he took practically all the property to which she was entitled, and endowed her with just as much or as little of his worldly goods as he pleased. She could not bring or defend an action in her own name or in her own right, and an injury done to her by the wrongful act of another person resulted, if an action were brought at all, in a pecuniary profit to her husband, into whose pocket the damages found their way. He could put her under lock and key if she didn't please him, and could, it used to be said, administer moderate personal correction to her if she did not behave properly. She could not, even after her husband's death, appoint a guardian of her infant children.

To-day, she is the mistress of her own property, and can deal with it without her husband's interference as freely and effectually as he can deal with his. She can contract for herself, appoint a guardian, bring and defend actions in her own name, and incur as many debts as she pleases. If she has a capable lawyer, and takes care to have a proper settlement, she can, by the very useful device known as the Restraint on Anticipation which is permitted only in the case of a married woman, protect her property against the claims of her creditors; and the unfortunate solicitor who, it may be, communicated the information to her and advised her to execute a settlement, and who actually prepared it, may find it difficult, as some members of the profession have learnt to their disadvantage, to recover payment of his costs. She can even bring an action against her husband to prevent him from entering her house if

it belongs to her as her own separate property, or bring an action for damages against him if he publishes a libel about her in carrying on a separate business of her own, although her husband is powerless to prevent her behaving in a similar manner towards himself. She certainly is to-day entitled to be called "the favourite of the law."

Now, some of these changes in the law owe their existence to the change that has come over the public sense and feeling with regard to the proper relations between the husband and wife. This branch of the law, which depends on questions of public policy, is always and necessarily undergoing changes. There are many instances of it to which I need not refer you, but let me give you one or two with regard to the particular branch of the law with which I am dealing. A century ago it was laid down in legal text-books of undoubted authority that a husband had dominion over the person of his wife, and could enforce her living in the common home. In 1840 a case came before the Courts which put this proposition to the test. A wife had left her husband's house without the intention of coming back to him. He enticed her back by stratagem, and having got her there he refused to let her go, and imprisoned her in the house. Upon an application to the Court for a writ of Habeas Corpus he contended that he was acting within his rights in doing so, and that he was entitled to use force to prevent her from leaving. The Court took this view, and laid down that for her protection the law placed the wife under the guardianship of the husband, and entitled him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world by enforcing cohabitation

and a common residence. Almost exactly fifty years later a similar question arose again. I refer to what was called the Clitheroe case. The wife in that case also had absented herself from her husband, and the husband, acting upon what the Court had fifty years before declared to be his rights, determined to put a forcible stop to the separation. He accordingly lay in wait for her one Sunday, accompanied by a lawyer's clerk and another person, as she came out of church. She was seized and thrown into the carriage, and the last that was seen of her by the congregation was her feet protruding out of the carriage window as it drove away. The matter coming before the Court upon an application for a writ of Habeas Corpus the husband claimed the right to take possession of her and to confine her to the house by force. The Court took a very different view from what had been taken fifty years ago. It decided that a husband has no such right of dominion over the wife as was claimed, that he was not entitled to imprison her in the house however laudable his motives, and it ordered that the lady should be set free.

In the course of the case the question was discussed whether a husband, among his other rights, is or ever was entitled to beat his wife. There was certainly a considerable body of authority in favour of the contention. It was explicitly laid down in works of authority, such as Bacon's *Abridgement*, that he could do so, "though not in a violent or cruel manner." In Blackstone's *Commentaries* the law is stated as follows :

"The husband also (by the old law) might give his wife moderate correction. For as he is to answer for her misbehaviour, the law thought it reasonable

to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife. The civil law gave the husband the same or a larger authority over his wife, allowing him for some misdemeanours *flagellis et fustibus acriter verberare uxorem.* (This allusion to sharp blows with whips and cudgels was not calculated to make a married woman's life at that time an altogether comfortable one.) The writer, however, goes on : " But with us in the politer reign of Charles the Second this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the common law, still claim and exert their ancient privilege, and the Courts of law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour." The writer goes on to observe "that even the disabilities which the wife lies under are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."

A somewhat pathetic note was appended to this statement by a learned editor in the early part of the last century.

> " Nothing (he says) I apprehend would more conciliate the goodwill of the student in favour of the laws of England than the persuasion that they had shown a partiality to the female sex,

> But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition (he goes on) to what has been observed in this chapter by the learned commentator, I shall here state some of the principal differences in the English law respecting the two sexes, and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth."

I do not think the reader would have much difficulty in deciding the question. Had the learned editor been able to foresee what the law would be in 1901 his affection for his subject might possibly have been stimulated.

I should add that in the Clitheroe case the ancient privilege of those who were so much attached to the common law was finally taken from them, for the Court emphatically laid it down that a husband, by the law of England, has no right for any purpose or under any circumstances to inflict personal chastisement upon his wife. The lady thus vindicated, for the benefit of herself and unborn generations of married women, the inalienable right of a wife not to be beaten by her husband. I ought perhaps to mention that some members of the Court declared that it had never been the law of England that a husband could use force or administer correction to his wife in the way contended for ; but that was not the unanimous view of the Court, and I think it is legitimate to observe that the view taken as to what the law is now was, at all events, not improbably influenced by the general sense that prevails at the present day in matters of this kind.

Now let me give you another instance. Deeds of separation between husbands and wives are of not uncommon occurrence, and to-day a mere verbal agreement between a husband and wife to separate and live apart on certain defined terms, if immediately acted upon, is binding upon both parties. The Court will give effect to it as to any other contract, and will restrain either party from breaking it without lawful excuse. At the beginning of the century the case was very different. The Courts had looked with disfavour upon agreements of this character, and when they first came to be recognised at all as valid agreements the Court would only regard the contract as binding in so far as it related to provisions in the document with respect to property, and then only if the contract was in the form of a deed. The view taken at that time was that it would be injurious to the public interest to allow the parties to renounce by agreement the solemn duties they had undertaken, and that they should be left to their remedies (if they had any) in the Courts. By slow degrees the law with regard to these agreements altered. The view came to be taken that it was not to the public interest to compel the parties to drag their disputes before a public tribunal and still further embitter the relations between them. The change, however, was a gradual one. A deed providing for immediate separation first came to be regarded as binding, not only with regard to the property clauses, but with regard to the separation itself, although there was a doubt as to whether the Court would enforce such an arrangement by injunction. An agreement to execute a deed of separation was not enforceable at all. At a later date this difference was

removed, and the Court came to regard an executory contract as of the same validity as if a deed had been actually executed. Later still it was decided that the Court would enforce performance of such an agreement by injunction. Now that the necessity of the interposition of a trustee has been removed by the Statute Law, a mere agreement between the parties themselves made by word of mouth is as effectual as a deed.

Now these are two instances of changes which are not due to legislation. Of course the change in the law has, for the most part, been the direct outcome of legislation. It is very curious to note how tardy this has been and how slow the legislature was to remedy the old grievances, and also how completely the common law of England was out of touch and harmony with the sentiments of the people themselves. It is difficult to realise that fifty years ago, while the subjection of women in point of fact had long been a matter of ancient history, their position in point of law when they entered into the marriage relation became one of almost absolute subjection. You find no trace in the ordinary literature of the time of their occupying any such subordinate position, or of marriage as making the woman the mere nonentity in point of law which she actually became. Read for example the novels of Miss Austen, and you could scarcely suppose that they reflected a state of things in which a woman on her marriage became unfit, in the view of the law, to enjoy rights over property or to enter into contracts on her own behalf. It must have been a shock to a woman who was ignorant of her true position to learn when she married that while she was treated by her friends and neighbours

as fit to associate with her husband on terms of independence and equality, she was not trusted by the law with a shillingsworth of property, and that any contract she made had as much efficacy as her husband's would have if he were an imbecile or in a state of hopeless intoxication. That, however, was her position in law at the beginning of the period I am dealing with. There were exceptions, which I might mention here. You may have read, during the mournful events of the last few weeks, the subject discussed in the newspapers of the position and power of the Queen Consort. It is interesting to know that the barbarous austerity of the common law did not affect her. To quote again from Sir William Blackstone :

> "'The Queen Consort' is a public person, exempt and distinct from the King, and not, like other married women, so closely connected as to have lost all legal or definite existence so long as the marriage continues. For the Queen is of ability to purchase lands and to convey them, to make leases, to grant copyholds, and to do other acts of ownership without the concurrence of her lord, which no other married woman can do, a privilege as old as the Saxon era. She may likewise sue and be sued alone without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short she is in all legal proceedings looked upon as a *feme sole* and not as a *feme covert*, as a single and not as a married woman. For which the reason given by Sir Edward Coke is this : 'Because the wisdom of the common

law would not have the King (whose continual care and study is for the public *et circa ardua regni*) to be troubled and disquieted on account of his wife's domestic affairs, and therefore it vests in the Queen the power of transacting her own concerns without the intervention of the King, as if she was an unmarried woman.'"

There were two other exceptions. One depended on an ancient custom of the city of London, allowing a married woman within the limits of the city to carry on a trade and contract and incur debts and acquire property as if she were unmarried. It was only in the City of London that this custom prevailed. The other was this: if a man were convicted of a crime and were civilly dead his wife could acquire and hold property and contract and sue and be sued as a *feme sole*. This was an invention created by necessity rather than by enlightenment, and on the husband regaining his freedom the wife apparently lost hers.

Apart from these exceptions the law was what I have described. Notwithstanding the repeated attempts of writers like John Stuart Mill to get it altered, Parliament was very slow to intervene. No doubt the explanation is to be found in the fact that the Court of Equity had, by the equitable doctrine of the "separate use" which had been well established long years before the beginning of the last century, afforded relief against the harshness of the common law and the restrictions it imposed upon the status and capacity of a married woman. No doubt by means of settlements either by deed or by will (by which alone separate estate could be created) the disadvantages of the common law were to some extent avoided. I say only to some extent, because even in

equity a married woman had no capacity to contract and could not bring or defend actions; and all questions concerning her liability to pay her debts incurred before marriage, or her right to sue for torts, or her liability for torts committed before or after marriage, were not affected. But the advantages conferred on married women by the "separate use" were necessarily confined to those who could afford to pay for settlements, and the large body of persons who could not afford them were left to the mercies of the common law. A lazy husband was still at liberty to appropriate all that his wife earned and support himself by her exertions, and the improvident and speculative husband could still impoverish her and himself by squandering all her unsettled property. In spite of protests by such writers as Mill the legislature was apparently content with a condition of things under which the husband kept all that he had and took all that belonged to his wife. It showed no real signs of interfering till the year 1870. It is true that by the Divorce Act of 1857 a married woman who was deserted by her husband was entitled for the first time to apply to a magistrate for a protection order, which protected her earnings, provided they were acquired in lawful industry, against the claims of her husband or his creditors, and protected any property that she might acquire, so long as the desertion continued, against any such claims. I have not referred to the Fines and Recoveries Act, 1833, under which a wife was enabled, with the concurrence of her husband, under certain conditions, to dispose of her real property, nor to the similar Act passed some years afterwards, known as Malins' Act, by which a similar power was given her with

regard to her reversionary interest in personal property, as these were rather in the nature of Conveyancing Acts than Statutes for the relief of the wife. The year 1870 was the first year in which Parliament began seriously to deal with the question. In that year the first of the series of Married Women's Property Acts was passed.[1] I am not going to stop now to consider the provisions of this Act in detail; it is sufficient for the moment to say that the Act was a curiously tentative and partial measure. It did, however, get rid of the injustice of allowing the husband of a woman who earned her living by her own exertions to appropriate what she earned, and secured to every married woman, whether married before or after the Act came into operation, the right to enjoy the fruits of her labour. It also secured to her, if married after the Act, the right to certain classes of property within specified limits, free from her husband's interference. It left, however, the general status and capacity of a married woman untouched. She still could not contract, and could not, speaking generally, bring or defend actions.

The Married Women's Property Act of 1874[2] (which merely dealt with the question of the liability of the husband and wife in respect of obligations incurred by her before marriage) may be passed over. It was not until 1882[3] that the legislature really dealt with the subject as a whole. In that year was passed the Married Women's Property Act of 1882,[3] which came into operation at the beginning of the following year. The result of that piece of legislation, without pausing to consider for

[1] 33 and 34 Vict. c. 93. [2] 37 and 38 Vict. c. 50.
[3] 45 and 46 Vict. c. 75.

the moment the details of it, was to sweep away for all practical purposes the old common law disabilities of a married woman. Since January, 1883, a married woman can bring and defend actions in her own name; she can hold all classes of property and deal with or dispose of them in exactly the same manner as if she were unmarried. She can be sued alone for her debts incurred before marriage; and she can, under that Act, as amended by the later Act passed in 1893, enter into contracts as fully and effectually as if she were unmarried, and incur a liability which is now for almost all practical purposes a personal liability. The Act of 1882 at the same time allowed a married woman to retain the benefits of what I have already referred to as the "restraint on anticipation" as completely as she could do at the time when this device was first invented.

This is a brief sketch of how the changes in the status of a married woman have come about. In the short time at my disposal I can only deal in a fragmentary manner with the details of the subject, but what I desire to do is to give you, as fully as I can within that time, a description of the interest that the husband and wife took in one another's property before the recent legislation began; to point out to you what the consequences were of the wife's incapacity to contract and hold property; to explain the effects of the equitable doctrine of "separate use," and then to say a few words on the provisions of the Married Women's Property Acts and one or two other statutes of similar date, pointing out what is the position of a married woman since those Acts were passed.

It will perhaps be better to begin with the "separate

use." You will understand that the Courts of Equity, when they permitted a married woman to hold and dispose of separate estate, did not pretend to interfere with the common law. If the property was vested in trustees, they continued to be the owners at law, and so far as the legal ownership was concerned they alone could dispose of or deal with it. If there were no trustees, the Court regarded the husband, who was in law the owner, as the trustee ; and the only way—although no doubt it was a very effectual way—in which the beneficial enjoyment of the property was secured to the wife was by forcibly restraining the husband or the trustee from interfering with it. This was of course sufficient for all practical purposes, and so far as the equitable interest or the beneficial enjoyment of the property was concerned the wife could dispose of it or deal with it as she thought fit. She could leave it by her will, she could sell it or give it away, or, if it was real property, she could by her own deed convey it or lease it ; and it is scarcely necessary to say that the income of her property or any savings out of it formed also part of her separate estate. Now, it is essential to point out that these rights, important and beneficial as they were, did not affect the status or capacity of the wife. She could not contract, in any accurate sense, even with respect to this separate estate. A contract implies a personal liability on the part of the party contracting, and an obligation to make good her contract or pay damages for the breach of it. A married woman incurred no such liability or obligation even if she purported to contract in respect of her separate estate. She could not be sued, and could not be made personally responsible if she failed to carry out

her promise. What she could do was to bind the separate estate itself by virtue of the engagement she made. If, when the time came for performance, she failed to perform her engagement, her creditor could, by means of a suit in equity, obtain satisfaction out of the estate itself, if it still belonged to her, but out of nothing else. The engagement did not operate as a charge, and if she had parted with the property the creditor was without a remedy. The fact is that the separate estate had a sort of existence of its own which a married woman could bind by her engagements (provided there was no restriction against anticipation), and her real position with regard to it was that of an agent contracting on behalf of a principal. A wife could, as you are aware, always make a contract as agent on behalf of her husband or any other principal at common law, and her power to bind her separate estate in equity was very analogous to this. When she entered into an engagement on her own behalf, borrowed money, for example, to be repaid out of her separate estate, she was in effect contracting as agent on behalf of her principal, the separate estate. If the estate, the principal, could pay, it had to pay when the creditor asserted his right and obtained a decree or judgment of the Court of Equity: if it had disappeared when the decree or judgment was obtained the creditor was without a remedy.

I believe that this analogy is in substance accurate, and will explain better than any other I know of the true position of a married woman in relation to her separate estate and her power to "contract" in respect of it.

The right of a person who was injured by a tort

committed by a married woman to obtain redress against her separate estate was this. He had to sue both husband and wife, as no proceedings could be taken against the wife alone. Before the law was altered by the Debtors Act, 1869, both husband and wife could be arrested under a writ of *ca. sa.*, and if the wife had separate estate out of which to pay the judgment debt the Court would not release her until the debt was paid. The judgment creditor could not then, and could not after the Debtors Act was passed, obtain satisfaction directly out of the separate estate, and his only remedy was by executing the judgment against the husband's effects. If, however, the wife in the course of dealing with her separate estate committed a fraud, the person defrauded could in that case, and in that case alone, make her separate estate liable, provided it was free from any restraint on anticipation.

I come next to the restraint on anticipation to which I have already so often referred. It is of the utmost importance that you should understand exactly what the incidence and effect of this restriction is. It has been preserved by the recent legislation, and the law with regard to it is the same substantially as it was originally. It was created in order to protect the wife against her husband, and to prevent him from inducing or coercing her to part with her separate estate for his benefit. The effect of it was to prevent her dealing in any way with the estate to which it was attached. Applying again the analogy of principal and agent, the wife had no authority to bind property so settled by her engagements. She was, so far as such property was concerned, in the position of an agent who purports

to bind his principal but has no authority to do so. If, therefore, her creditor who lent her money, for example, on the faith of her separate estate found that all she had was subject to a restraint on anticipation, he was without a remedy. It ceased to be operative as soon as the marriage came to an end by the death of the husband or by a decree absolute of divorce; but, of course, as the estate had never been bound by the "contract" the creditor could not have recourse to it when the event happened. The property in effect was not the wife's at all. She could only dispose of or bind the income after it had actually become due and come into the hands of her trustees. She could settle her own property upon herself in this way, the restraint being as effective as if it had been created by a stranger.

This was, briefly, the position of a married woman in equity. I wish next to point out very shortly what her position was in law, and what rights her husband acquired, by virtue of the marriage, in her property. One is a little startled to find that his rights came into operation even before the marriage was solemnised. So jealous was the law of any interference with the marital right of the husband that after once the "favourite of the law" had agreed to marry him she could not deprive him of any of her property without his consent. It would be an intolerable hardship on the intended husband if the woman he was about to marry were allowed to give anything away or to settle her property in favour of herself to her separate use without consulting him. At least the law took that view of it, and if you refer to the authorities on the subject you will find many instances of a husband getting

settlements or gifts by his wife before marriage set aside on this ground. You will not be surprised to hear that there was no corresponding right in the wife, and her intended husband might strip himself of all he possessed so far as she was concerned. Fortunately for the student, whose "goodwill" the law desires to "conciliate," he has seen the last of these "frauds on the marital right." This inequitable state of things came to an end in 1883. Since the Married Women's Property Act, 1882, the husband's marital right in his wife's property has been extinguished, and both parties now before marriage are entitled to deal with their property as they please.

When the marriage had been solemnised the husband's rights in his wife's property differed according to the description of the property. If it consisted of freehold estate the husband's rights were limited. He and his wife were said to be seised of it by entireties. It was vested in them both, but while her deed was inoperative in respect to it he could convey the right to the rents and profits for their joint lives by his own deed alone, although on the death of either of them the deed ceased to be operative. If he died first it passed to her, unaffected by any will of his; if she died first it passed to her heir at law, unaffected by any will of hers, subject to the husband having an estate for his life by the curtesy in estates of inheritance provided issue had been born alive of the marriage. They could, as you are aware, by their joint deed convey and make a good title to the realty provided her acknowledgment of the deed was duly taken before a Commissioner under the Fines and Recoveries Act, to which I have referred.

Her leasehold estate was on a different footing.

This belonged to the husband absolutely during the marriage, and he could dispose of it or mortgage it by his deed alone. He could not, however, dispose of it by will so as to deprive her of it if she survived him. Her personal chattels which were in her possession at the time of her marriage, or came into her possession during the marriage, belonged absolutely and for all purposes to her husband, and he could deal with them as he liked. If the wife had personal property outstanding in other persons so that, if necessary, an action would have to be brought to recover it, the husband was entitled, if he could, to reduce it into possession, and if he did this during the marriage it belonged absolutely to him. Here, however, the Court of Equity had something to say. By what was known as the wife's "Equity to a Settlement" the Court laid down this rule, that if the husband had to come to a Court of Equity he must, on the principle that he who seeks equity must do equity, make a proper settlement on his wife before the Court would assist him. The amount to be settled depended on the conduct of the husband and the wife; the general rule was to make the husband settle one half; but in extreme cases he was made to settle the whole fund upon her. On the other hand, if she had been guilty of misconduct, the Court would allow the husband to retain the whole. By degrees the Court extended its "sphere of influence" in respect of the wife's choses in action. In course of time the wife was herself allowed to apply to the Court to enforce her equity to a settlement and her rights with regard to it were still further enlarged by including legal as well as equitable choses in action within the rule.

It would be a mistake to suppose that the question of a husband's common law rights in his wife's property has become an academic enquiry and has ceased to have any practical importance. The recent legislation has carefully preserved them, though they cannot arise in the case of a marriage solemnised or property acquired after 1882. I remember a learned reviewer suggesting that a discussion about a wife's equity to a settlement since that date would be about as profitable as a discussion about the different kinds of snakes one would be likely to meet with in a journey through Iceland! This was a bad point, even for an irresponsible reviewer. Cases have frequently arisen since 1882, and will still arise in which the old law governs the rights of the parties, and not for many years will it be possible to determine what their rights are without knowing something of the subjects I have been discussing.

There is one matter I must mention before leaving this part of the subject. The law allowed a married woman, as an exception to the general law, to retain a limited property in certain articles called "paraphernalia." They consisted of articles such as jewellery given to her by her husband for her personal adornment. They differed from separate estate in this respect, that she could not dispose of them during her husband's lifetime. On the other hand, her husband could dispose of them during his life, and after his death they were subject to his debts. It seems, according to a recent decision, that paraphernalia still exist, notwithstanding that all property given to a married woman since 1882 belongs to her as her absolute separate property, and that if jewels are given to a wife by her husband not expressly

declared to be her separate property, they are still held under the same tenure as paraphernalia were held formerly. This appears to be a little anomalous, and one might have supposed that according to the letter as well as the spirit of the Act any gift of property to a married woman by her husband or anybody else would, at all events if not expressly qualified, have been an absolute gift to her for all purposes. The only remaining point to notice is what was called pin-money. That term denoted an annual payment which was often provided in marriage settlements to be paid to the wife, to enable her to supply herself with dress or personal ornaments. This, again, did not belong to her as her absolute separate property, and it seems that any savings by the wife out of this fund did not form part of her separate estate. The provision, of course, ceased when the marriage relation came to an end.

It remains to notice the interest that a husband took in his wife's property after her death. I have already mentioned the estate by the curtesy which applied not only to her unsettled property but also to her separate estate. The husband also was entitled to administer to her personal estate if she left any at her death. This could, at common law, only apply to her choses in action, as her chattels in possession had become his during the marriage. Her separate personal estate in possession also become his on the wife's death, without the necessity of taking out administration.

So much for the wife's property. Her interest in his property consisted of her dower and her right to a share in his personalty if he died intestate. She also had the right (secured to her by Magna Charta)

to "tarry in the chief house of her husband for forty days" after his death, unless her dower was assigned before then, or unless the house was a castle, in which case another house had to be provided for her. This is her right of "quarantine." Her dower, which consisted of an estate for life in one-third of his estates of inheritance, was enlarged by the Dower Act passed in 1834 and extended under that Act to his equitable as well as his legal estates. This advantage, however, was more than compensated for by the larger power which the Act gave the husband of depriving his wife of dower altogether, and the net result of the transaction, if a "profit and loss" account were taken, would be a doubtful benefit to the wife. If you contrast this with an Act passed about fifty years later, in 1890, which altered the devolution of the husband's personal estate if he died intestate, the change is instructive. Here the benefit has been wholly in favour of the wife. By that Act, instead of sharing the property with his children, or next-of-kin if there are no children, the wife gets £500 as a first charge before the estate is divided and still retains her share of the residue.

I have now described the condition of things in 1870, when the Act of that year was passed. I have told you that it was only a tentative measure. Husbands already married were not disturbed in the enjoyment of their marital rights except as to money which their wives might earn or save out of their earnings. This was secured to the wife. If a married woman wrote a book after 1870 the copyright was made her own separate property. If she made money as an artist or by the exercise of her skill in any other occupation it belonged to her, just as

women of the wage-earning class had a right under that Act to keep their wages. If she carried on a separate business of her own the profits belonged to her. Women who married after the Act passed were dealt with rather more liberally. Any property, real or personal, coming to them under an intestacy was to be their own separate property. If money was given to them, on the other hand, under a deed or will they could only keep it if it did not exceed £200. They were enabled, whenever married, to sue in their own names to recover their earnings or other statutory separate property, or to take criminal proceedings to protect it. Power was also given them to hold fully paid shares and to transfer stock. Their husbands were not forgotten, for as a compensation for what they gave up to their wives they were released from all liability for their wives' debts incurred before marriage. They were partially deprived, however, of this exemption four years later, the Act of 1874 making them again liable (if married after that Act) to the extent of any property they acquired through their wives.

I ought to mention also that married women by the Act of 1870 were for the first time made liable to maintain their children if they were possessed of separate property.

I now come to the Married Women's Property Act of 1882, which, as I have said, came into operation on January 1st, 1883, and which has wrought a change of so wholesale a character in the law. I do not, of course, propose to go in detail into the sections of the Act; what I want to do is to give you as comprehensive an account as I can of the general effect of it upon the status and property of married women.

It practically re-enacts the provision of the former Act as to the wife's earnings, and the husband's liability for her debts incurred before marriage. It does not, as I have said, affect rights acquired or liabilities accrued before 1883, though it applies to women already married so far as subsequently acquired property is concerned. It begins by stating that a married woman can hold and dispose of any property as her separate property as if she were unmarried, without the intervention of a trustee, and it enacts that all the property belonging to a woman who marries after 1882, whether it belonged to her at the time of her marriage or is acquired during marriage, belongs to her as her separate property. In the case of previous marriages all the wife's property, her title to which accrues since 1882, belongs to her as her separate property. Thus all the marital rights of the husband in her various classes of property which I have dealt with before are swept away if the property is acquired or the marriage solemnized since 1882. She can dispose of her property as she pleases, without his concurrence, and his marital interest in it is extinguished. All that remains to him is the estate by the curtesy which attaches as much to the separate property which is created by the Act as it did to the old separate estate in equity, and, of course, the right to administer to her estate if she dies without a will, which is also unaffected. Inasmuch as the wife can dispose of her free separate property, the value of the estate by the curtesy as a prospective asset is necessarily diminished.

The Act then proceeds to deal with the contracting capacity of a married woman. It provides that a married woman may enter into and render herself

liable in respect of and to the extent of her separate property on any contract as if she were unmarried. Any contract she makes is presumed to be a contract with respect to, and to bind her separate property, unless the contrary is shown, and her contract binds not only the separate property that she had at the time, but also all separate property which she afterwards acquires. Now I must stop here for a moment to point out a very obvious difficulty that these words, "in respect of her separate property," created. They have led to a great deal of litigation. Soon after the Act passed the difficulty arose. A married woman purported to dispose of separate property which she was not at the time possessed of and the Court had to determine whether she could do so, or whether her power to contract and dispose of property was still confined (as it was before) to separate property which belonged to her at the time. The Court took the latter view, and notwithstanding the wide terms of the Act held that if a married woman had no separate property at the time of the contract she still had no contracting capacity at all. This led to other difficulties. The Act, as I have mentioned, makes future acquired property liable under the contract, and the question arose whether the possession of any separate property, however small, enabled her to contract so as to bind such after acquired property. It was held that it did not, and that it was only if the married woman held property of such a kind as to make it reasonable to suppose that she intended to pay her debt out of it that her contract had any validity. Her creditor therefore still had to run the risk of the contract turning out to be invalid and inoperative because at the time she

made it she had not sufficient property to enable her to enter into it. A further difficulty arose. Suppose a married woman had made a contract which bound her separate property. Could it be enforced against property which she was possessed of after her husband's death? Was this (which was not strictly separate property at all) liable under the contract? The mischief had become so great that in 1893 the last of the series of Acts was passed, which got rid of the difficulty, and since that time it has not been necessary and is not necessary now to prove, in order to enforce a contract made by a married woman, that she was at the time possessed of any separate property at all. Her contract, like the contract of anybody else, operates so as to give her creditor the right of enforcing the contract against any free property she may have when he puts in execution, and although even now it appears that a married woman cannot be committed to prison as an ordinary debtor if she has means and refuses to pay her debt, she is for all other purposes in the same position and has the same contracting capacity as an unmarried woman. Property which she possesses as a widow is expressly made liable by the last Act to satisfy her contractual obligations.

I had intended, had I had time, to criticise the somewhat narrow construction which was placed upon the Act of 1882, and give you reasons for thinking that it was interpreted in a way never contemplated by the legislature. I can only, in the short time at my disposal, say this, that the words "in respect of and to the extent of her separate property," which appear to qualify the contracting capacity of a married woman, always seemed to me

to have been only inserted in the Act to avoid the consequence of the non-separate property of women already married being affected by the change in the law. A woman married since 1882 has and can have no property that is not her separate property. There is nothing technical now in the expression "separate property," and if a married woman can carry on a trade by contracting "in respect of her separate property" as she now can, it seems impossible to suppose that the legislature contemplated that her liability was other than the ordinary personal liability which any other contractor assumes. However, the subject, though it is not without interest, has ceased since the Act of 1893 was passed to be of much practical importance.

In connection with the subject of contracts by married women I must say a word about a wife's contracts for "necessaries," and explain how far the old law still applies to them. They used to form an important branch of the law of husband and wife and do so still, though perhaps not so important as formerly. The ordinary case is that of a wife who, while living with her husband in the ordinary way, pledges his credit for necessaries for the household or for herself or their children. Suppose, for example, that she is ill and calls in a doctor, or goes to a shop and buys groceries or other goods for the household, or to a dressmaker or milliner and orders clothing for herself or for her children. In all these cases she had at common law a presumed or *primâ facie* authority to contract as her husband's agent, and it was presumed that she made the contract in that capacity and on his behalf. The same presumption applies still, notwithstanding the recent change in the law, and the

fact that the wife has property of her own, and can contract on her own behalf, would not affect the presumption. Her authority, however, is only a *primâ facie* one. If her husband pays her an allowance or prohibits her from pledging his credit she cannot make him liable. This assumes that she is being properly maintained. If she had no means, and was deprived of bare necessaries, so that she was obliged to buy food or starve, she could pledge his credit against his will, as what is called an "agent of necessity." This case falls under the second branch of the subject, which is this: if a husband deserts his wife, or treats her so badly that she is reasonably justified in leaving him, and does not supply her with means—she herself being without adequate means of her own—she was at common law entitled, as an agent of necessity, to pledge his credit for necessaries suitable to his means and position in life. She is entitled, in fact, to maintain herself and her children, if he refuses to support them, in a style suitable to his own, at his expense, and the tradesman who supplies her can make the husband pay. In that case her authority is not derived from the husband's will at all, and no prohibition even to the tradesman will protect him. Of course the tradesman takes his risk in these cases, and if he fails to prove the circumstances giving rise to the authority he cannot recover. This rule, again, is not affected by the change in the law, the wife possessing the same right as at common law to make her husband suitably maintain her. The third case is that of a husband and wife living apart by consent. At common law the wife could pledge the husband's credit under those circumstances for suitable necessaries if he

failed to pay her an agreed allowance. She could, no doubt, sue him now on the contract to pay, but notwithstanding this it seems reasonably clear that she would still have the right, if he would not pay, to buy necessaries as his agent, the law in this respect also not being altered. In all these cases where the wife can pledge her husband's credit whether he likes it or not, she can, if she pleases, borrow money as his agent, and the person who lends it can, on proving that it was expended in necessaries, make her husband liable.

There is one change that the recent legislation has made in all these cases which it is important to bear in mind. Formerly a married woman, not being able to contract on her own behalf, was in the position of an agent who stipulates when he buys goods or makes any other contract on his principal's behalf that he shall not incur any personal liability. Now she can contract like any other person, and therefore she, like any other agent, impliedly warrants that she has her principal's authority. The tradesman therefore who supplies her with necessaries, or a person who lends her money to enable her to buy them, can now make her liable in damages if it turns out that she had no authority to pledge her husband's credit, and is no longer confined to his chance of successfully proving a cause of action against the husband.

I have referred to the change in the law with respect to a married woman carrying on a separate business or trade. You will observe the importance of this change when taken in connection with the capacity she now has to enter into contracts and to sue and be sued at law. Her power to contract is not restricted; she can make a valid and binding contract

with her husband as well as with a stranger. There is nothing, therefore, to prevent her from entering into a partnership with her husband, each introducing so much capital, and being entitled to a definite share in the profits. They can have their joint and separate assets like any other partners, and their joint and separate creditors. If she does carry on a trade she can be made a bankrupt, as the Act expressly makes her under these circumstances subject to the Bankruptcy Laws. It is only in these conditions, however, that the Bankruptcy Act affects a married woman. If she is not a trader, the "favourite of the law" is, unlike other people, exempt from the unpleasant consequences of a bankruptcy notice.

It would be advisable for persons having dealings with a married woman who is a trader to be careful how they deal with her, for it may turn out that she has settlements, and that her property is subject to a restraint on anticipation, and if so her creditors will find it difficult to get hold of her assets, even if she is made a bankrupt. None of the changes in the law affect the restraint on anticipation; and bankruptcy, in the case of a married woman who is a trader, is no exception to this rule.

The next alteration in the law to notice is that which relates to the power of a married woman to bring and defend actions. I have pointed out her position before the recent legislation. Since the Married Women's Property Act, 1882, was passed she is altogether free from the restrictions she was then under, and can sue or be sued without joining her husband. Here again she had, under the Act of 1882, an advantage over other people. Although she may have had ample property of her own she

may have had no free separate property to which her opponent might have recourse for payment of his costs if he succeeded; as a restraint on anticipation effectually deprived a successful opponent of the right of being paid out of a fund so settled. She was, however, entitled under that Act, and still is entitled, to sue without giving security for costs. The hardship, however, to her opponent of not being able to get his costs if he succeeded out of the settled fund was removed by the Act of 1893, and a successful defendant is now entitled to be paid out of the fund, notwithstanding that it is subject to a restraint on anticipation. This provision, however, only applies to proceedings which are taken by the married woman herself, and if she appeals against a judgment recovered against her as defendant she is still protected by the restraint. The Court of Appeal can, of course, in its discretion, make an order for security for costs.

Now there is a somewhat strange anomaly to notice in connection with this subject. If a married woman makes a contract as principal her husband cannot, if the contract is broken, be joined as defendant. It is her contract, not his, and she must be sued alone. If she commits a tort, the law, as I have said, formerly was that she and her husband must be sued together, the reason being that she could not be sued alone by reason of her disability. The Act of 1882 has removed the disability and says that she may now be sued alone. It might be thought that as the only justification for joining her husband as defendant is gone she alone can now be sued and that this was the intention of the Act. It has, however, been held otherwise, and

the husband is still liable to be joined as defendant, and if judgment goes against him and his wife execution may be levied against his goods. A plaintiff is, of course, not likely to elect to sue the wife alone, and the result is that the husband who has been deprived of his marital right in her property still has to pay damages for her wrongful acts. There is no provision made for the husband recouping himself out of her separate property.

I mentioned at the beginning of my lecture that a wife can sue her husband for trespass or for a libel published about her in regard to a trade which she carries on. This is the result of a section in the Act of 1882 which says that a married woman may take proceedings (civil or criminal) against all persons, including her husband, for the protection of her separate property. Such actions as those I have referred to are clearly for the protection of her separate property. It is a little startling to find that a wife may get an injunction restraining her husband from entering her house. The Court in so deciding suggested that such a proceeding would not be allowed if the object was to bring about a virtual separation between the parties. It might, of course, have that effect. In the case referred to the wife had some valuable plate in the house and the husband's visits seemed not to be unconnected with the plate. Possibly he held certain views about the advantage of the common law rule as to the reduction of the wife's property into possession. This mode of asserting his marital rights seems to have been taken into account by the Court in granting an injunction. I also mentioned that a husband could not keep his wife out of his house by an action of

this kind or get redress if she inflicted similar wrong upon him. This is the consequence of a direct provision of the Act of 1882. The husband certainly is not favoured in this respect.

I have endeavoured now to deal with most of the leading provisions of the Married Women's Property Acts. The real difficulty, and one which I venture to think has not yet been fully appreciated, is the application to the new law of the "Restraint on Anticipation." This is the keynote to the present position of married women, and it raises questions of enormous importance. What the effect may ultimately be of allowing a married woman, who is now free from all the restrictions formerly imposed upon her by the common law, who can contract, carry on a trade, sue and be sued in tort or contract as if she were unmarried, to acquire property or tie up her own property in such a way that her creditors cannot have recourse to it, it is very difficult to see. It was reasonable enough when she could not contract and could only bind separate estate which she had at the time, to say that she should have no power to bind any particular property at all, but to apply that rule to the altered circumstances is a very different matter. Let me give you an instance of what I mean. If a married woman incurs a debt to-day, she may be possessed of great wealth, partly her own, partly what has been given to her, but it may all be subject to a Restraint on Anticipation. What is to happen after the husband's death when the Restraint has ceased to operate! Although the Act of 1882 says that all her after acquired property is liable, and the Act of 1893[1] says that her property after her

[1] 56 and 57 Vict. c. 63.

husband's death is liable also, the effect of a restraint on anticipation is the same as it was before, and property which was subject to it at the time of the contract still cannot be reached by the creditor. Suppose the widow realizes all her property and buys furniture out of a blended fund made up partly of free and partly of settled property, I suppose the sheriff can seize it under a writ of *fi. fa.*, but it does not seem clear. If she invests the proceeds of the settled fund only in furniture or land it would seem that the creditor cannot touch it, as it is only the settled property in another form. If the wife carries on a trade and is made bankrupt her creditors apparently cannot (as I have already suggested) touch property tied up in this way. The result is certainly disastrous to her creditors, and may, in the long run, prove to be disastrous to the wife herself by destroying her credit, at all events if she is carrying on a trade. The experiment of putting old wine into new bottles is often, like the reverse process, dangerous. The law even used to be that if a married woman deceived the person with whom she contracted by telling him that the property she had was not subject to a restraint on anticipation, she was still protected, and the creditor had no remedy against the property. That appears to be the law still.

There is one way in which the difficulty may possibly to some extent be got over if the wife is carrying on a trade. The Court has power under the Conveyancing Act, 1881, to remove the restraint if it is for the wife's benefit to do so. Possibly if her creditors are sufficiently pressing and offensive it may be for her benefit that the restraint should be

removed, and the Court may be persuaded to remove it. This has happened, so that there is a precedent for doing it. It is scarcely a satisfactory way out of the difficulty, and, if this were the only escape from it, a loan to a married woman in business would be a somewhat speculative transaction.

There are other changes in the law of minor importance which I have not been able to deal with. Let me mention one or two. The Married Women's Property Act, 1882, has for the first time brought within the reach of the criminal law a husband who in the act of deserting his wife steals her separate property and a wife can in similar circumstances be prosecuted for stealing her husband's property. This would, of course, have been impossible at common law. Again, the objection to appointing a married woman a trustee has been at all events to some extent removed as the right to contract by an express provision of the Act includes the right to accept the office of trustee. The husband apparently is no longer responsible as he was formerly for any breach of trust that the wife may be guilty of in discharging her duties.

A wife is also now liable if she has separate property for poor-law relief afforded to her husband. Before 1882 she could not be made liable in such a case. If she is rich and deserts him, and he is without means, he cannot pledge her credit for necessaries as she can his if she is deserted. But then she is the "favourite of the law."

I cannot conclude without noticing two Acts of Parliament which were passed within the last twenty-five years, one in 1878 and the other in 1886. They are both now represented by a codifying Act of

1895.[1] They perhaps lie outside the range of my subject, but I notice them because they so strongly illustrate the trend of recent legislation for the protection of married women. They practically affect only the wage-earning class. By the first of these Acts, a wife who has been cruelly treated by her husband is, if the assault was of an aggravated kind, enabled to apply to a magistrate for a separation order. The effect of an order is to enable her to live apart from her husband as if she had obtained a decree of judicial separation, the magistrate having power to order him to pay a weekly sum for the maintenance of herself and her children, the custody of whom can be given to her. By the other Act, if a wife is deserted by her husband she can apply to a magistrate for an order for maintenance, and the magistrate, if satisfied that the husband could maintain her, can order him to pay a weekly sum up to £2 for her support. Before this Act, if the wife had no friends to assist her, the workhouse was the only refuge left to her; as it would, of course, be impossible in practice to obtain money or necessaries on her husband's credit. It would be difficult to estimate the value to the poorer class of married women of these two Acts of Parliament, and the number of cases in which they have been acted on may testify to the amount of relief which they have afforded to the ill-treated wives of brutal husbands.

I must now bring my subject to a close. It is interesting to know that the century that has gone, in addition to the many other improvements in the law, may take credit for having removed from the laws of England a condition of things which in this important

[1] 58 and 59 Vict. c. 39.

department of the law was out of date and little short of barbarous, and that the tide of change that set in about thirty years ago has, in that short time, completely swept away all the artificial disabilities of a married woman. It is singularly appropriate that it should have been during the reign of our beloved Queen, Queen Victoria, that this great blot on the common law of England should have been removed. All the changes in this branch of the law have been effected during that reign. It is within the last half-century that married women have been emancipated and set free from the restraints imposed upon them by the common law and placed in a position which they were long ago entitled to occupy—a position of independence and equality with their husbands.

MONTAGUE LUSH.

## XII.

# THE HISTORY OF JOINT STOCK AND LIMITED LIABILITY COMPANIES.

(Thursday, *February* 21*st*, 1901.)

THE rise and progress of the system of trading by joint-stock companies is one of the most striking phenomena of modern commerce and the nineteenth century. The system has its grave defects, but it has also the supreme merit of rendering possible an enormous number of undertakings, which could not, from their magnitude, be carried out by any ordinary partnership or group of capitalists. It has vindicated itself as a useful and important element in progress, and its legal history is therefore well worth attention.

A Joint-Stock Company is a society consisting of a number of individuals having transferable shares in a common fund. As constituted in modern times, its chief characteristics from a legal point of view, are that it enables the individuals composing it to act as if they were one person and a legal entity, to transfer with facility by sale or otherwise their interests in the common property, and to limit their liability for the debts of the concern to a fixed amount. These advantages have been obtained by slow degrees.

The Joint-Stock Company is a thing or creature unknown to the common law. The common law recognised individuals and corporations as the only legal entities or persons. Even to-day English law does not consider a firm or partnership to be a legal entity or person save for certain limited purposes mainly connected with procedure. Austin, and most writers on jurisprudence, mean substantially the same thing as English lawyers when they divide juristic or legal persons into natural and artificial, including in the latter corporations. Corporations, with exceptions not material to the subject, could, at common law, arise only through a special exercise of the authority of the Crown or Parliament. To grant Charters of Incorporation is one of the high prerogatives of the Crown,[1] and, as you are well aware, there is in theory nothing impossible to Parliament. Corporations were in practice created both by the Crown and by Parliament. For example, in 1600 the English East India Company was incorporated by Royal Charter under the title of "The Governor and Company of Merchants of London trading to the East Indies," and in 1750 the "African Company" was established by special Act of Parliament.[2] Sometimes, as in the case of the notorious South Sea Company, a question arose whether the powers of the Crown extended to the grant of a Charter containing special provisions conferring trade monopolies, and in that case it was customary to confirm by Act of Parliament the privileges granted by the Charter. Thus also the Charter conferred upon the Royal College of Physicians, in the tenth year of Henry

[1] Stephen's *Commentaries on the Laws of England*, 8th edn. vol. ii. p. 516.

[2] 2 and 3 Geo. II. c. 31.

VIII., was confirmed by the statute 14 and 15 of Henry VIII. c. 5. Sometimes, as in the case of the East India Company, Chartered rights were altered or abrogated by Act of Parliament. But in every case a special act of authority, a "Privilegium," in the language of the Roman Law, was necessary to confer upon a number of individuals the capacity to trade in a corporate name as a corporate body.

The simple grant of a Charter of Incorporation by the Crown to a body of traders did not meet the commercial necessities of the case. The effect of such a grant was that the property of the corporation only, and not that of the individuals composing it, became liable to the debts it contracted. It was not within the common law powers of the Crown to grant a Charter of Incorporation, and at the same time to make the members of the corporation individually responsible for its debts—as if they were members of a partnership. The effect therefore of the grant of a Charter to a trading company was to create a species of limited liability such as exists in the case of a company limited by shares, which are fully paid up, under the Acts now in force; but this attribute of limited liability was precisely that which was objectionable to the lawyers and statesmen of the last century. For business purposes what was then wanted was a body which could sue or be sued in a corporate name, and the members of which should be individually liable for its debts; and this was to be the line of advance.

The advantages of a capital divided into shares readily transferable were so evident that from time to time in the eighteenth century companies (I use the term for the sake of brevity; they were really

no more companies in the modern and legal sense of the word than a West-End club is a company) were formed on such a basis, and appealed to the public for subscription of capital. These associations or companies were viewed by the Courts with great disfavour, and it is doubtful whether they were not illegal at the common law. Lord Lindley, in a learned note in his book on companies, tells us that Lord Eldon had a great aversion to them, and appeared to be of opinion that companies with large capitals arising from numerous small contributions and with transferable shares were injurious to the public and illegal at common law. In *Blundell* v. *Windsor*,[1] decided in 1837, a joint-stock company formed for working gold mines in North America, the shares of which might be increased to an unlimited extent, and were assignable at the discretion of the holders, was held to be illegal and fraudulent, and a demurrer to a bill filed by one of the shareholders against the others for the purpose of carrying into effect a dissolution of the company was allowed. But later cases seem to have proceeded upon the principle that a company with freely transferable shares is not at common law an illegal association or a nuisance, although it was, of course, impossible for the Court to give effect to any provision in the deed of settlement of such a company limiting the liability of the shareholder to the amount unpaid on his shares or otherwise.[2] But if such companies were not illegal at common law, they were clearly illegal within the Act known as the

[1] 8 Simon, 601.

[2] *Walburn* v. *Ingilby*, 1 My. & K. 61 ; *Garrard* v. *Hardey*, 5 Man. & Gr. 471 ; *Harrison* v. *Heathorn*, 6 Man. & Gr. 81.

Bubble Act,[1] which remained in force rather over 100 years,[2] and must have retarded the development of joint-stock trading. The history of the Bubble Act is interesting, because it introduces us to a great company boom in the last century, and shows how reckless promoting was treated by the Whig statesmen of the reign of Geo. I. It is not wholly true that company promoting is a latter-day symptom of commercial decadence. In the year 1720 a wave of wild speculation, originated or at least stimulated by the anticipated success of the South Sea Company, overwhelmed the country. Innumerable companies were launched to carry out wild-cat projects, and amongst other promising undertakings may be noted the following[3]: "To make salt water fresh"; "For fatting of hogs"; "For a wheel for perpetual motion"; "For importing a number of large jackasses from Spain." Most of these companies were successful in getting subscribers. Perhaps the most impudent adventure was one entitled, "For an undertaking which shall in due time be revealed." Each subscriber to this company was to pay down two guineas, and afterwards to receive a share of one hundred guineas with a disclosure of the objects of the company. The public, to use a modern promoter's expression, was so much on the feed, that 1000 subscriptions were paid the same morning, with which the promoter disappeared in the afternoon. Nor was the modern element of the guinea-pig director absent from the madness of 1720. Even the Heir Apparent to the Throne, in teeth of the advice of

[1] 6 Geo. I. c. 18, sec. 18.
[2] It was repealed by 6 Geo. IV. c. 91.
[3] Stanhope's *History of England*, vol. ii. p. 11.

the Speaker of the House of Commons and the great Sir Robert Walpole, appealed to the public as a director or governor of the Welsh Copper Company. The Ministry of the day, alarmed by the situation, issued a Royal Proclamation "against such mischievous and dangerous undertakings, especially presuming to act as a corporate body and raising stocks or shares without legal authority." The Prince of Wales' company was one of those threatened with prosecution. His Royal Highness with commendable caution withdrew, having made a profit of some £40,000.

It was in the early stages of the boom to which I have referred that the Bubble Act was passed. The material part of that Act for our purpose consists of the recital of "the growth of dangerous and mischievous undertakings and projects wherein the undertakers and subscribers have presumed to act as if they were corporate bodies and have pretended to make their shares transferable," and the enactment that the "acting or presuming to act as a corporate body or bodies—the raising or pretending to raise transferable stock or stocks ; the transferring or pretending to transfer or assign any share or shares in such stock without legal authority either by Act of Parliament or any charter from the Crown, to warrant such acting as a body corporate or to raise such transferable stock or stocks or to transfer shares therein . . . should be deemed to be illegal and void, and should not be practised or in any wise put in execution, and all such undertakings were to be deemed public nuisances."

The Act does not appear to have been much put into force, probably because after the South Sea smash, in which many undertakings besides the great

company which gives its name to the crisis, were involved, few companies were formed. Political and mercantile opinion was adverse to the formation of joint-stock companies. The current views on the subject are probably correctly expressed by Adam Smith, who, in the *Wealth of Nations*, published in 1776, states his opinion[1] that the only trades a joint-stock company not having a monopoly can carry on successfully are those of which all the operations are capable of being reduced to routine or to such a uniformity of method as admits of little or no variation. Only four trades in his opinion answer the test of suitability which he thus laid down, namely, those of banking, of fire and marine insurance, of making and maintaining canals, and of bringing water for the supply of a great city. Manufacturing by a joint-stock company, he considers, will not only be unsuccessful as a business, but is also injurious to the public welfare.

Reference may be made to one or two cases decided upon the Bubble Act. In *R.* v. *Dodd*[2] it was laid down by the King's Bench that a company with transferable shares, inviting subscriptions by a prospectus, which held out that the company was being formed under a deed of trust or enrolment in Chancery by which no party should be accountable beyond the amount of shares for which he should subscribe, was illegal on the ground that it was, in the words of Lord Ellenborough, "a mischievous delusion calculated to ensnare an unwary public." Again, in *Josephs* v. *Pebrer*,[3] a company with shares transferable without restriction was held by the same

[1] Book 5, part 3, article 1. [2] 9 East, 516.
[3] 3 B. & C. 639.

Court to be clearly mischievous, particularly because the shares were sold at a considerable premium. Chief Justice Abbott thought that this tended to introduce gambling and rash speculation to a ruinous extent to the grievance of a number of His Majesty's subjects.

It must, however, be pointed out that it is not absolutely clear that the bare fact of raising or creating transferable stock, provided that the stock was not freely transferable in the modern sense, was sufficient to render an association illegal under the Bubble Act, unless, in the words of Lord Ellenborough, in *The King* v. *Webb and others*,[1] it had relation to some undertaking or project which had a tendency to the common grievance, prejudice, or inconvenience of His Majesty's subjects or great numbers of them.

Thus at the commencement of the nineteenth century both law and public opinion were adverse to the formation joint-stock companies. We have now to trace the steps by which a revolution in both was brought about, and a state of things has been reached which causes many competent persons to ask whether the facilities for creating joint-stock companies with limited liability are not greater than public welfare justifies.

During the first years of the century there was an enormous increase in the population, wealth, and industries of the country. In the 15 years 1801 to 1816, notwithstanding the great war with Napoleon,[2] the population of England and Wales increased about two millions two hundred thousand. In the 100 years previously to 1801 it had increased only about three millions. In 1791, the last year of peace, the

[1] 14 East, 406. [2] Walpole's *History of England*, vol. i. p. 38.

expenditure of the country was less than 17 millions. In 1815, at the end of the great war, it was 91 millions. During this period of storm and stress, when our statesmen and soldiers were often and anxiously engaged in guarding the liberties of England, and helping the rest of Europe to guard their own liberties against the Napoleonic danger, our trade was advancing by gigantic leaps and bounds. The value of the British and Irish imports in 1793 was 18 millions,[1] in 1815 it was 41 millions. The value of the exports in 1798 (the earlier figures are not available) was 33 millions, in 1815 it was just under 50 millions. The causes of this heightened prosperity are not for our consideration to-night, but the great mechanical discoveries of the latter portion of the 18th century and the new colonial acquisitions are present to the minds of all my hearers. The effects of this prosperity were numerous, and one of them undoubtedly was first to change public opinion and next to cause the law to be altered as to Joint-Stock Companies. New fields of industry had opened out with which it was impossible for individual capitalists to cope; trade on a large scale was becoming a more important factor in the national life.

In 1825 the Bubble Act was repealed, and the course of legislation from that year up to the year 1900, when the most recent Companies Act was passed,[2] has been to encourage the formation of Joint-Stock Companies.

What was wanted for trade purposes was, as I have said, a body which could sue and be sued in a corporate name, and the members of which should be

[1] Walpole's *History of England*, vol. i. p. 44.

[2] 63 and 64 Vict. c. 48.

individually liable for its debt. It was further desirable that persons should be speedily and at moderate expense able to form themselves into such a body. Public opinion at this time—that is, in the early years of the century—did not think it desirable that the members of such a body should be able to limit their liability to a specified amount.

The first step in advance was taken by the same Act of 1825,[1] which repealed the Bubble Act. By this statute the Crown was empowered to grant Charters of Incorporation, and at the same time to declare that the persons incorporated should be individually liable for the debts of the body corporated. The liability was to be to such extent and subject to such regulations and restrictions as should be declared in the Charter.

The next step was the Act of 1834, which proceeded on different lines.[2] The Act of Geo. IV. just referred to met the difficulty by giving the Crown power to create corporations, the members of which should be individually liable for the debts of the society. The later Act met it by giving the Crown power to confer the same privileges by Letters Patents as it could confer either at Common Law or under the Act of 1825 by Charter of Incorporation, and also—and this was the principal feature and novelty of the Act—the privilege of bringing and defending actions and other legal proceedings in the name of an officer of the association. The Crown was thus empowered to create a body or entity which was neither an individual, a corporation, or a partnership the several members of which might or might not according to the provisions of the letters patent be liable for its debts, and which

[1] 6 Geo. IV. c. 91, s. 2. [2] 4 and 5 Will. IV. c. 94.

could sue and be sued, not in its own name, but in that of an officer. I should mention that it was at this time a frequent thing for the legislature when creating a new body or association, such as Harbour Commissioners, River Conservators, and the like, to confer upon it the power to sue, and render it liable to be sued, in the name of a public officer.

You will notice that under each of the Acts to which I have referred it was necessary to make a special application to the Crown to confer the charter or privileges desired. This application occasioned expense and delay. It was absolutely within the discretion of the Crown whether it should be granted or not, and the action of the Crown was determined by the opinion of the law officers upon the merits of the application. Persons proposing to become a Corporation for the purpose of carrying on a trade not approved by the devil of the Attorney General of the day, might have found an insuperable obstacle to their intentions. The legitimate demands of industry could not be satisfied until it became possible for persons desiring to carry on a legal business to form themselves into a legal entity by complying with certain simple requisites and paying the prescribed fees.

To some extent this privilege was in the year 1826 conferred upon banking companies by an Act[1] subsequently repealed,[2] but it was not until 1844 that an Act[3] was passed enabling all companies with certain exceptions to obtain a Certificate of Incorporation without applying either for a Charter or an Act of Parliament.

In the year 1844 then there was passed the first

[1] 7 Geo. IV. c. 46. [2] 7 and 8 Vict. c. 113.
[3] 7 and 8 Vict. c. 110.

statute under which persons could become incorporated as a joint-stock company, under the regular law of the land and without the necessity of a special Act of the Crown or Parliament. Under this Act by executing a deed containing particulars as to the capital and shares of the company, and also certain necessary regulations for the conduct of the company's business, it became competent to persons to obtain from the Registrar what was called a certificate of complete registration. The effect of such certificate was that the shareholders were incorporated in the name of the company, for the purposes, amongst other things, of suing and being sued.

We have thus reached one landmark in the history of company legislation, the right of a number of persons to become a corporation and thus capable of suing and being sued in a corporate name without any special grant from the Crown or any Act of Parliament.

What was the position of the members of a company so formed in relation to the debts of the company? As I said before, the theory of limited liability found no favour with the public or lawyers of the early part of the century. The member of such a company was consequently made liable for the debts of the company just as if the company were a partnership of which he was a member. There was, however, one difference between his liability and that of a member of an ordinary partnership, namely that before he could be sued by a creditor of the company it was essential for the latter to prove that he could not obtain payment of his debt from the company.[1] Parliament could and sometimes did by special Acts form companies the liability of whose members was

[1] Sec. 66.

limited, but it was not until the year 1855 that the first general limited liability Act was passed.[1] As to all future companies this Act assumed registration under the Companies Act of 1844 and added certain requisites to those of that Act as the conditions upon which limited liability could be obtained. The shares were to be of not less nominal value than £10[2] and the word "Limited" was to be the last word of the title of the company. The limitation of the shareholders' liability was obtained by the provision[3] that if execution against the company was ineffectual to produce the full amount of the judgment debt, then execution might under an order of the Court issue against the individual shareholders to the extent only of the portions of their shares in the company not then fully paid up.

It is convenient now to mention the first Act which contains provisions for the winding up of joint-stock companies.[4] It was passed in 1844, and is as it were a corollary to the Companies Act of that year. It created and defined the acts of bankruptcy which might be committed by a company, such as a declaration of insolvency,[5] non-payment of a judgment debt,[6] or of a sum ordered to be paid by a Court of Equity,[7] and applied to a joint-stock company the general law and practice in bankruptcy.[8] It further contained a most useful provision directing an inquiry to be made by the Bankruptcy Court into the causes of the failure of a company.[9] Two later Acts[10] established a method of winding up companies in the Court

[1] 18 and 19 Vict. c. 133. [2] Sec. 1. [3] Sec. 8.
[4] 7 and 8 Vict. c. 111. [5] Sec. 4. [6] Sec. 5.
[7] Sec. 6. [8] Sec. 11. [9] Sec. 25.
[10] 11 and 12 Vict. c. 45; 12 and 13 Vict. c. 108.

of Chancery on the petition of a contributory, that is, a shareholder, and avoiding the necessity for this purpose of a Bill in Equity, to which it was essential that all the shareholders should be parties.

The Act of 1855, that is, the first general Act by which the liability of shareholders might be limited, was hardly passed when it was repealed. In the following year, 1856, another general Act[1] was passed which in many respects served as a model for the Act of 1862,[2] now the basis of our Company Law. The signature of a Memorandum of Association containing certain specific particulars and the method of introducing, in a Schedule to the Act, regulations for the management of the company subject to alteration by the Company were introduced by this Act.[3] The effect of registration was to create a body corporate.[4] Elaborate provisions were contained for winding up companies by the Court of Bankruptcy, and creditors as well contributories were authorised to present petitions for that purpose.[5] Companies were further enabled to wind themselves up voluntarily.[6] An Act of 1857[7] contained certain additions to and amendments of the Act of 1856.

We have now arrived at the modern conception of the Joint-Stock Company, with limited liability capable of being established without any special Act of the Crown or Legislature, on the mere initiative of a number of private individuals. Succeeding Acts of Parliament have accepted this principle, and have laid down the conditions under which such companies may be formed and carry on their

[1] 19 and 20 Vict. c. 47. [2] 25 and 26 Vict. c. 89.
[3] Ss. 3, 5, 9, and 10. [4] Sec. 13. [5] Ss. 59-101.
[6] Ss. 102-105. [7] 20 and 21 Vict. c. 14.

operations. Before examining these Acts I must direct attention for one moment to the Companies' Clauses Act, 1845.[1] This was an Act passed to render unnecessary the repetition in every private Act of Parliament, establishing a railway or other company, of the numerous common form provisions relating to the management and constitution of the company. The Act in question provided that these provisions should be deemed to be incorporated in every private or special Act establishing a Joint-Stock Company, except so far as such special Act expressly varied or excluded them. It dealt with such matters as the definition of a shareholder of a company, his right to a certificate for his shares, the manner in which shares should be transferred, the making and enforcement of calls on shares, and the forfeiture of shares for non-payment of calls; the power of the company to borrow, the procedure at meetings, and, speaking generally, the matters which are nowadays in the case of companies registered under the Act of 1862, dealt with in Table A or in the Articles of Association of the company. The provisions of this Act are indeed the basis of the Articles of Association of our modern Joint-Stock Companies, and they themselves were in great part derived from former Acts and Charters establishing Companies and the provisions of innumerable Deeds of Settlement of companies.

The important point to remember is that the Companies Act, 1845, does not in substance affect the law relating to Joint-Stock Companies or limited liability. It applies only to companies established by special Act of Parliament, and it causes to be read

[1] 8 and 9 Vict. c. 16.

into their special Acts certain common form provisions which would otherwise have to be expressly included in such Acts.

The Companies Act, 1862,[1] is the first of the series of Acts which constitute the existing code of Joint-Stock Company law. It repeals the Act of 1856 to which reference has been made. It provides that no company, association, or partnership, consisting of more than ten persons, may, for the future, be formed to carry on the business of banking unless either registered under the Act or formed in pursuance of some other Act of Parliament or of Letters Patent, and that no such company, association, or partnership, consisting of more than 20 persons, may be formed for the purpose of carrying on any other business having for its object the acquisition of gain either by the body itself or by the individual members thereof unless registered under the Act or formed as before mentioned. Registration under the Act is easily, perhaps too easily, obtained. Seven or more persons may sign what is termed a Memorandum of Association, may deliver such memorandum to the Registrar, and having paid the fees and complied with certain other simple requisites, become entitled to a certificate from the Registrar that the company is incorporated. The effect of incorporation is that the subscribers to the memorandum of association, together with future members of the company, form a body corporate by the name mentioned in the memorandum of association, having perpetual succession and a common seal, with power to hold lands. Further, they may be so incorporated either with or without limited liability. If it is intended that they

[1] 25 and 26 Vict. c. 89.

should be incorporated with limited liability, the memorandum of association must state the fact, and the word "Limited" must form the last word in the name of the company. The liability may be limited by the memorandum of association either to the amount, if any, unpaid on the shares held by the members, or to such amount as the members may undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up. A company, the liability of the members of which is limited in the former manner, is spoken of as a company "limited by shares,"[1] and this is the position of the vast majority of companies. If the limitation of liability is by the latter method referred to, the company is said to be a company "limited by guarantee."[2]

In all cases, whether the company is limited by shares or by guarantee, or is unlimited, the objects for which the proposed company is to be established are to be stated in the memorandum of association.[3] After several rather conflicting decisions it is now well established that a corporation created by charter from the Crown has *prima facie* the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to. Even if the charter expressly says that the corporation shall not have power to do certain acts, or to enter into certain contracts, nevertheless, it can legally do such acts and enter into such contracts;[4] although by so doing

[1] Sec. 8. [2] Sec. 9. [3] Sec. 8, 9, and 10.

[4] *Wenlock* v. *River Dee Company*, 36 Ch.D. 674, at p. 685, per Bowen, L.J.; *Riche* v. *Ashbury Railway Company*, L.R. 9 Ex. 224, at p. 263, per Blackburn, J.

it might incur a forfeiture of its charter, which the Crown could enforce through a proceeding known as *scire facias*. But a company incorporated under the Companies Act, 1862, and the amending Acts, and probably also a company incorporated by a special Act of Parliament, stands in a very different position.[1] The memorandum of association or special act, as the case may be, is, in the words of Lord Selborne, in the *Ashbury Railway Company* v. *Riche*:[2] "the unalterable law" of such a company. The company is incorporated only for the objects and purposes expressed in its memorandum or special act. Every act or contract of such a company which transgresses this fundamental law is absolutely void. Such an act or contract cannot be ratified by the express assent to it of every individual shareholder of the company. Thus the modern company is not the ancient corporation. It does not possess the ordinary attributes of legal personality. It is bound down, cabined, and confined within the limits of its memorandum of association. One practical effect of this limitation is that the fundamental law, the memorandum of association of a modern company is usually so expressed as to include every object which the ingenuity of the draughtsman can conceive as being possibly within the scope of the company's remote attention. A stationery company with a capital of a few thousands is given power to construct and establish "tramways," and a land company to undertake and execute any kind of trusts. Some companies appear to take powers to engage in every business known to the

[1] *Wenlock* v. *River Dee Company*, *supra* at p. 685, per Bowen, L.J., and 10 App. Cas., 354, at p. 360, per Lord Blackburn.

[2] L.R. 7 H.L. 653, at p. 694.

civilised world, and one of the gravest defects of existing company law—a defect not remedied by the Companies Act, 1900—is that shareholders sometimes find that their money is being employed in a business entirely alien to the main objects of the company, and one into which they had no intention of putting it, but because such business is covered by one of the numerous clauses of the memorandum they are powerless to prevent what is often a great injustice to themselves. The Companies Act of 1890[1] provides that every prospectus of a company must state the contents of the memorandum of association of the company, a requisite which was indeed formerly insisted upon by the Stock Exchange, but is probably of little protection to shareholders. For not only will the ordinary layman not read legal documents, but neither he nor the skilled lawyer himself can foretell how in future an incidental but useful or necessary "object" of the memorandum may be developed into the main and principal part of the company's actual business operations. Some check there ought to be, and, if no better one can be devised, I would make it compulsory on every new company to state in its memorandum a main and principal object or main and principal objects of limited scope, and I would leave it to the Court to decide in each particular instance whatever the other clauses of the memorandum might be, whether the act complained of was or was not conducive or incidental to one of the main objects.

This is not the proper occasion for a discussion of the details of Company Law, but I may point out that a company may alter, or by the aid of the Court

[1] Sec. 10.

obtain alterations in its memorandum of association in certain strictly defined ways, under conditions varying according to the nature of the alteration. Its existing shares may be consolidated or subdivided into shares of a larger or smaller amount. Its capital may be increased or reduced. The liability of the directors of a limited company may be made unlimited. A company registered as unlimited may turn itself by re-registration into a limited company; and lastly, the objects of the company may within certain limits be added to, altered, or restricted.

The Act of 1862, like the former Act of 1856, contains elaborate provisions for the winding up of companies by the Court and voluntarily, and also by an intermediate process known as "winding up under the supervision of the Court"; and these provisions are added to or varied by subsequent Acts of Parliament. If time did not forbid, it would be interesting to discuss these different methods of terminating the existence of a company. But I can only say now that a considerable aversion is shown by companies and also by creditors of companies to winding up by the Court. During the nine years, 1891 to 1899 inclusive, while 9312 voluntary liquidations have taken place, only 887 compulsory winding-up orders have been made.

I now pass to a few figures which will give some idea of the extraordinary magnitude of the capital employed and the business transacted by limited companies. According to a recent return,[1] it appears that during the year 1898, 5073 companies were registered in the United Kingdom under the

[1] House of Commons Report, Joint-Stock Companies, 8th Aug., 1899.

Companies Acts with a nominal capital. That nominal capital amounted to £272,287,690 7s. 0d., of which £51,160,443 8s. 4d., that is about 3s. 9d. in the £ was paid up in cash, and of which the amount considered as paid on vendors' and other shares was £85,895,804 5s. 5d., a sum considerably in excess of the amount paid up in cash, and a fact the significance of which will be appreciated by any company experts who may be present.

According to the same return there were in April, 1899, 27,969 registered joint-stock companies in the United Kingdom with a share capital, having an aggregate paid-up capital, including amounts considered as paid on vendors' shares, of £1,512,098,098.

In the year 1899, 4533 new companies were registered in England and Wales, 1793 companies went into liquidation, and 946 abortive or defunct companies were removed from the register, under powers which are contained in the Acts, without having gone into liquidation. The net increase in companies during the year was therefore 1794.[1]

During the eight years, 1892 to 1899 inclusive, 30,061 new companies were registered under the Companies Acts, and 10,578 were wound up under those Acts. The balance of 19,483 does not represent the net increase during the period in question, since many abortive or defunct companies were struck off the register under the powers of the Registrar which have just been referred to.[2]

These figures are the more striking when it is remembered that they do not include most of our great railway, water, gas, canal, and other similar companies. Such companies are usually established

[1] See Board of Trade Report, 2nd Aug., 1900, p. 4. [2] *Ib.*, p. 5.

by their own private Acts of Parliament, in which the Companies Act, 1845, is incorporated.

It is not possible in a single lecture to discuss in detail or even to state the advantages and disadvantages of our present Company Laws, looking at them from the point of view of the public welfare, and in their least technical aspect, but I am bound by my syllabus to attempt a summary of their chief characteristics.

Joint-stock companies have rendered an enormous number of undertakings possible which from the amount of capital required could not have been carried out by a capitalist or a group of capitalists. Further, many businesses can be carried on more economically on a large scale, the ratio of expenses growing less in proportion to the size of the capital employed. Thirdly, capitalists on a large scale can afford to risk more in the field of inventing and perfecting processes. On the other hand, it is tolerably certain that the management of joint-stock companies (excluding private companies) is not equal to that of individuals or partnerships, and many things therefore have doubtless been badly done by joint-stock companies which, if joint-stock companies had not existed, would have been well done by a firm or individual.

Limited liability in one form or other is, or appears to be a necessity of modern commerce, and tends to encourage undertakings of evident utility, but involving risk to the undertakers. It provides also a convenient means of investment for persons who are or are presumed to be of no business capacity. On the other hand it tends to promote gambling to an enormous extent. It weakens the genuine business

capacity of the nation by diminishing the incentives to care in making investments. It tends to encourage dishonesty, for it is one great cause of that neglect to scrutinise and verify prospectuses which renders possible the success of fraudulent promoters. A glance at the statistics of company insolvency may well make us pause before accepting limited liability as an unmixed blessing. It appears on good authority that in the year 1899 about 1345 companies with a capital of 21 millions subscribed by the public, and 27 millions in vendors' shares, became bankrupt.[1] This, it may be safely said, indicates (1) a vast volume of unskilful trading and waste of money; (2) a large amount of deception in the formation of the companies, and (3) considerable suffering by unfortunate shareholders. Nevertheless this argument must not be pressed too far, since no statistics can be considered conclusive on the advantages of limited liability which do not involve a comparison between the losses of capital by private individuals and firms and those by limited companies. Even if the materials for that comparison exist I have no time now to enter into it.

The foregoing considerations go to the root of the principle of limited liability, and it is difficult to see how any amendments of the law likely to be accepted by the British people can seriously affect them. Other defects of Company Law might be remedied without destruction of the principle of limited liability. For instance, the Companies Acts were never intended to allow a hopelessly insolvent trader (with the aid of six clerks or domestics) to form a limited joint-stock company, to sell his

[1] Board of Trade (Inspector-General's) Report, 1900, p. 5.

business to that company for debentures charging all his property, and an undertaking by the company to pay all his debts, to gradually transfer his creditors to that company by the process, either of novation, that is, substituting the company as the debtor instead of himself, or of paying off the old debts for which he was liable with the company's money, and contracting new ones for which the company is responsible, and finally, when the inevitable crash comes, to walk off as sole debenture holder with the remaining assets of the company, leaving the other creditors without a penny to divide amongst themselves. Yet this is a moral fraud which is perpetrated every day, and which, since the decision of the House of Lords in *Salomon* v. *Salomon*,[1] it seems difficult or impossible to countervail. I think it would be possible to prevent frauds of this kind by statute without injuring legitimate business, or detracting from the spirit of the rule that a registered joint-stock company is a corporation having a legal existence independent of and apart from the individual members who compose it.

Only principles or broad outlines can be discussed to-night, and on that assumption, I may say, that putting aside questions relating to the formation of companies and the liability of directors, the existing legal position is usually considered to be satisfactory. Creditors, indeed, in recent years, have complained that they have often given credit to companies on the strength of the large amount of assets which they apparently possessed, only to find that when the evil day of winding up has arrived such assets were swept off by debenture holders of whose security they had

[1] (1897) A. C. 22.

no notice and no certain means of obtaining notice. So far as the personal chattels comprised in such security are concerned, if the debtor had been an individual or firm and not a company, the security would have been void unless registered as a bill of sale, but the Courts have decided that debentures of a company charging the undertaking and all its property, both present and future, do not require registration as bills of sale.[1] So far as other assets charged by such debentures, such as land and book debts are concerned, the creditors of a private individual or firm would have been in no better position than the creditors of a company, and have had no means of easily and certainly ascertaining whether they were charged or not. Indeed, the creditors of a company had more chance of obtaining knowledge of a charge upon such last-mentioned assets than the creditors of a private individual, since by section 43 of the Companies Act, 1862, it is made the duty of the directors to keep a register of mortgages and charges specially affecting property of the company, and such register is to be open to inspection by any creditor or member of the company. It has, however, been decided that the non-registration of a mortgage or charge under this section does not in any way affect its validity,[2] and consequently mortgagees themselves were not under any pressure to secure its observance, and it is not surprising that Companies in a declining way of business were not careful to keep accurately or at all a register of their mortgages. Practically, therefore, the creditor of a

[1] *In re Standard Manufacturing Company*, (1891) 1 Ch. 627.

[2] See *In re Patent Bread Co.*, L.R. 7 Ch. 289; *Wright* v. *Horton*, 12 App. Cas. 371.

company was on the same footing as regards the disclosure of mortgages on property other than chattels as the creditor of a private individual or firm, but as regards a mortgage of chattels the latter creditor was in the better position, since he could discover it by a search at the bills of sale office. The recent Companies Act, 1900,[1] reverses the position and places the company creditor in a superior position to the creditor of a private individual. Not only must such mortgages and charges as would be bills of sale if made by individuals and mortgages or charges of uncalled capital be registered, but mortgages or charges of land or any kind of property for the purpose of securing an issue of debentures, and floating charges on the undertaking or any of the property of a company must also be registered. Creditors of a company are now in no worse, but seem to be in a better position as regards knowledge of securities given by the debtor over his apparent property than creditors of an individual or firm.

It cannot therefore be said that the joint-stock and limited liability system is unfair or prejudicial to ordinary unsecured creditors of a company. Such creditors have in fact more chance of obtaining some useful though not adequate knowledge of the means of their debtor than creditors of a private individual or firm. In addition to the provisions of the Companies Act, 1900, just referred to under the Companies Act, 1862,[2] a company with a share capital is bound to make an annual return stating the names and addresses of its members, the amount of its capital and the number of shares into which such capital is divided, the number of shares which have been

[1] Sec. 14. [2] Sec. 26.

taken, the amount of calls made, the amount actually received, and the amount yet unpaid, with other particulars. Under the Act of 1900,[1] the return must distinguish between the shares issued for cash and those issued otherwise than for cash, and must further show the total amount of debt due from the company on mortgages which would require to be registered under the Act. These particulars do not, it is evident, enable a person considering whether he shall give credit to a company to obtain anything like an accurate view of the company's financial position. They do not tell him how much of the capital actually paid up has been lost, how much of the capital subscribed but not paid up is, in fact, irrecoverable, or what is the amount owing to unsecured creditors; but they do give him some valuable information which may form the basis of subsequent inquiries. The information, such as it is, is much greater than that which is usually obtained by creditors with reference to their individual debtors.

It has indeed been suggested on very eminent authority[2] that every limited company should be bound to file with the Registrar once a year a statement of assets and liabilities, founded on the belief of the Directors as to their value, and it is pointed out "that the growth of the system of private companies trading with limited liability and without publicity at any time is a grave danger and ought not lightly to be permitted by the legislature." This opinion was not adopted by the Committee to which it was made

[1] Sec. 19.

[2] Addendum of Lord Justice Vaughan Williams to the Report of the Board of Trade Committee on the Companies Acts, 1895, p. 21.

by Lord Justice Vaughan Williams, a committee which consisted of the most eminent company experts in the country, but its rejection appears to have been based[1] principally on the adverse views of business persons. Now I cannot admit that as a rule business persons or even chambers of commerce take adequate views of the duty of disclosure in relation to contracts, and I have far more confidence in the opinions on this particular point of the profession to which most of us already belong or shortly will belong. The memory of the late Lord Chief Justice of England will ever be held in esteem, if for nothing else than the fact that he truly recognised and unsparingly expressed his disapprobation of the elastic morals which to so large an extent prevail in circles of the business world not commonly considered to be disreputable. As to this particular proposal for the publication of the assets and liabilities of limited companies, it is a little difficult to see why if it is useful in their case, it should not be equally useful in the case of partnerships or individual traders. In each case credit is given to the trader on the strength of apparent assets, the real existence of which can already be verified under existing law, more easily in the case of a company than of a private individual or firm. Perhaps the best defence of the proposal is to say that it would be useful in the case of individuals and firms, but that public opinion would never allow it to be adopted in their case, while in the case of companies it might be considered a fair condition upon which to confer the boon of limited liability.

It is not in the law relating to companies as going

[1] Report, clause 52.

concerns that important alterations in existing law are chiefly suggested. It is round the vexed and critical questions attending the formation of the company, the purchase of the property which is to form the substratum of its business, the issue of its prospectus, and the subscriptions for or underwriting of its shares that controversy arises. Promoters of companies appealing to the public for subscriptions usually, and often quite legitimately, wish to make a profit out of the formation of the company. Under existing law such profit must be properly disclosed to the subscribers by the prospectus or otherwise. Further, if the contract is subject to adoption by the company an independent Board of Directors acting on behalf of the company must be provided. At once a host of questions arise. It is not always easy to determine whether a particular person is or is not a promoter of a certain company, or is an independent director and not a mere nominee of the promoter; nor whether a cunningly-worded prospectus from which by comparing its various parts a company expert might spell out the profit made by the promoters, is or is not a compliance with the rules of the Courts. Long practice in sailing near the wind has made it possible for some framers of prospectuses to tell the truth in such a manner that nine out of ten of the general public think that what is in reality a most damning fact, is a harmless or even gratifying piece of information. It is quite common to read in a prospectus, "the vendors are also the promoters of the company and have fixed the price to be paid by the company for the property." How many a village clergyman or doctor, in hot haste to realise the large profits anticipated by the prior para-

graphs of the prospectus, has thought when he came to this significant sentence "the vendor, the promoter; the kind man, ah! how good of him to promote this company, and sell to it the property which is to make these large profits," and has thereupon written out and sent off the cheque which has cost him many a day's hard labour. The truth is that improved elementary education notwithstanding, the public do not understand and generally do not read those portions of a prospectus which contain the key to the real objects of the promotion. They read the matter descriptive of the nature of the undertaking offered, probably also the valuations and auditors' reports as to profits which may or may not be trustworthy; but when they come to the legal phraseology as to "promoters," "contracts," etc., they give it up, saying to themselves, that they only mean to invest a small sum and practically trust in Providence and the good man who is so very kind as to act both as promoter and vendor. As evidence of the absolute indifference of the public to the legal portions of prospectuses a well-known London company solicitor of old and high standing stated in a memorandum to the Committee to which I have before referred,[1] that in his experience he had not had more than fifteen persons to inspect contracts offered for inspection by companies in the formation of which he had been concerned, and that of those fifteen certainly one-third were persons who had no intention of subscribing for shares, but had applied to see the contracts for ulterior purposes. I may also add, that I know of several cases in which the prospectus read by a competent person would have

[1] Report, page 73.

disclosed the actual figures of an exorbitant profit, and yet because the businesses were well known to the public the capital was in each case subscribed over and over again.

The problem is therefore a double one. It is not only how to ensure an honest prospectus, but also how to give the public brains to understand it. With the latter part of the problem we are not now concerned. The Companies Act, 1900, is an honest though not very great effort, to solve the former part of the problem.

It endeavours to protect the public to some extent against fraudulent promoters by providing securities of varying degrees of utility that persons advertised as directors have really agreed to act as such, and to take and pay for their director's qualification shares; that a company shall not go to allotment on an insufficient application for shares or commence business with insufficient capital; that underwriting agreements, profits of promoters, and certain other important and material matters shall be disclosed in the prospectus; that an early meeting of the company shall be held, at which, with some knowledge of the real position, the shareholders may discuss the formation of the company and its affairs; that, as I have mentioned already, debentures and certain other mortgages shall be registered at Somerset House, and that an auditor shall necessarily be appointed, with power to enquire fully into the accounts and affairs of the company. All or most of these provisions will no doubt be useful, and may help to stem the flood of commercial fraud and dishonesty, which, in the year 1901, finds its chief manifestation in, but is certainly not confined to, company promoting. It is, however, greatly to be

regretted that section 10 does not require disclosure to the public of "every material fact known to any director or promoter of the company who is a party to the issue of the prospectus." The words I have just cited were, in the original draft of the Bill, suggested by the Committee to which I have several times referred, and seem to be specially relevant to the following words of the report of that Committee. "It is therefore of the highest importance that the prospectus upon which the public are invited to subscribe shall not only not contain any misrepresentation, but shall satisfy a high standard of good faith. It may be a counsel of perfection and impossible of attainment to say that a prospectus shall disclose everything which could reasonably influence the mind of an investor of average prudence. But this, in the opinion of your Committee is the ideal to be aimed at, and for this purpose to secure the utmost publicity (disclosure?) is the end to which new legislation on the formation of companies should be directed."[1] Great objection no doubt was taken to the insertion in the Act of the words omitted, and it was suggested that they would render the position of a director so difficult and dangerous that persons of business experience and reputation would be deterred from accepting directorships. It is probable, however, that the words proposed would not add materially or at all to the existing liabilities of directors, and they would certainly serve as a reminder to them of what is their plain duty.

The argument against stringency of legislation in relation to companies, that thereby suitable persons would be prevented accepting directorships is strongly

[1] See Report, par. 6, page 6.

urged in city and other circles, but I think is in many respects fallacious. I entirely agree that many persons, some of them with distinguished names and titles who are now apparently respected directors of prosperous or unprosperous companies, would, if their legal responsibilities were increased through alterations in the law, be driven by motives of self-protection to resign their offices. These would comprise not only the pure guinea-pig, or decoy director, who has an illustrious name or title, and no commercial ability, but also the efficient man of business, the great entrepreneur, who has many more irons in the fire than he can properly attend to. A large proportion, perhaps the majority of directors, belong to one of these two classes, the incompetent or the over-busy. I think you might with advantage make the liabilities of directors, who are now to a great extent treated as regards legal responsibility in the lenient manner in which the law treats trustees, the same as the liabilities of paid agents or managers. The true analogy is between a director and a paid agent, and not between a director and a trustee. A director, is in fact, usually paid by the company; a trustee is not paid by his cestui que trusts. A director becomes such for his own sake and not for the company's; a trustee usually accepts the position for the sake of his cestui que trust and not for his own sake. For good directorships there is as keen competition as for any other good appointments. A good trustee, as many in this room are well aware, is a very difficult bird to catch. It would be good public policy to frighten off the boards of existing and future companies all guinea-pig directors, and to cut down the number of directorships held by three-fourths of the efficient directors;

and you would go some way towards doing this if you made the liability of directors, or at all events of all paid directors, the same as the liability of other paid agents. Paid agents are deemed to contract that they possess such skill as is ordinarily possessed and employed by persons of common capacity engaged in the same trade, business, or employment, and that they will exhibit in the affairs of their agency that degree of diligence which persons of common prudence are accustomed to use about their own business affairs. This is surely not too high a standard of diligence to require from the directors of a business concern. If the guinea-pigs were liable for their incompetence, and the competent directors were liable for not giving sufficient time and attention to the business of the undertaking, there would be a strong probability that capable directors with sufficient time at their disposal would more frequently than at present control the affairs of companies. An incidental consequence of such an alteration in the legal position of directors would doubtless be that boards would consist of smaller numbers and be more highly paid than at present. To effect such an alteration is probably in the face of reported decisions beyond the powers of the Courts, and it is extremely difficult, for obvious reasons, to get Parliament, constituted as it now is, to accept legislation rendering the position of directors more responsible. The argument so powerful with Parliament, based upon rendering business impossible rarely distinguishes between good and bad business. It would be an excellent thing for trade in the long run and for England's position in the world if some large proportion of existing business in the company line were rendered impossible and done away with,

and I know of no better way of helping to bring this about than the change I have referred to.

We all hope that the Companies Act, 1890, may induce or compel promoters to be more truthful, and directors to be more honest and careful. For the rest, we must remember that we cannot in the long run expect companies to be as successful as private traders. Many companies, such as mining companies, are admittedly pure gambles. Others—perhaps the majority of the other companies which ask for public subscriptions—are really treated by the subscribers for their shares as gambles, and their prospectuses are not read with anything like critical attention. I suppose that most of us gamble in one form or other until experience has taught us that on the whole we don't win. It is doubtless somewhat more respectable to speculate in the shares of a West African mine, or a company formed for buying and carrying on a score of consolidated pork-butchers businesses in the South-east of London, than on the advice of the sporting prophet of a halfpenny journal to bet on a horse we never saw, owned by a man we never heard of, and for a race the correct title of which we cannot pronounce. Companies which successfully appeal to investors of this type, or shall I say to investors generally in their gambling moods, are not likely to be sound commercial concerns, and such companies will continue to be floated under any law which would not unduly fetter sound undertakings, and will attract and help to ruin their modicum of subscribers.

I think that the conclusions of public opinion of the better sort upon the subject of our lecture would probably be somewhat as follows :

1st. That joint-stock companies and limited liability are, for the reasons I have already referred to, great advantages and indeed necessities of modern business.

2ndly. That though we cannot hope to make people very careful in their investments or to eradicate the spirit of gambling in making them, we can advantageously enforce upon promoters the duty, not only of not lying, but of telling the whole truth.

3rdly. That companies would be more successful if the liabilities of directors were greater.

4thly. That fraudulent conversions of insolvent private businesses into joint-stock companies ought in some way or other to be stopped.

5thly. That a differential treatment of the so-called private companies is, as soon as anything like a consensus of opinion on the subject can be reached, very desirable.

6thly. I may further venture to suggest that the several Companies Acts ought now to be consolidated. This might be done without making any alteration of the existing law except in matters where there was no substantial difference of opinion.

I imagine it will not be seriously contested that, while morals have in many respects greatly improved during the last century, business morals are little better at the end of it than they were at the beginning. It will also be generally admitted that the chief development of recent fraud and dishonesty have been in the field of Company Law. As company trading increases, and it appears probable that it will increase, this danger, unless checked, will grow greater. It is unnecessary to point out that dishonest trading for England, a nation of traders,

means national decadence. I may be too great a believer in my own profession, but I seriously think that members of the English bar are in advance of average commercial men in their ideas of right and wrong, of concealment and disclosure, in business matters. I therefore with confidence appeal to them to exercise their public and private influence in favour of greater honesty in company matters, and, if alas it should be necessary, to exercise also their ingenuity in devising such further checks on fraud as will, without seriously diminishing legitimate business, render it more difficult for unsound schemes to be successfully placed before the public.

T. B. Napier.

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GLASGOW: PRINTED AT THE UNIVERSITY PRESS BY ROBERT MACLEHOSE AND CO.

1907

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